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IN THE

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1935.

No. 34.

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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BRIEF ON BEHALF OF RESPONDENT.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF FACTS.

This action was brought by respondent for the purpose of quieting title to a small parcel of tideland which forms a part of the shore of Mormon Island, which island is situated in the inner bay of San Pedro, now known as Los Angeles Harbor, being a harbor, bay, or inlet of the Pacific Ocean, which harbor, bay, or inlet has at all times subsequent to the 9th day of September, 1850, been within the exterior boundaries of the State of California.

In the year 1880 a survey was made of said island by one W. H. Norway, and the field notes and plat of said island, as prepared by the surveyor were filed in the office of the United States Surveyor General and the Commissioner of the General Land Office. In the survey of Mormon Island the surveyor meandered the shore thereof, which was in accordance with the printed manual of surveying instructions issued by the General Land Office, and in accordance with the terms of his contract. The land shown on the plat was designated as Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian.

Thereafter, and in the year 1881, a patent was issued to William Banning which purported to convey to William Banning all of Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian. The land described in the patent to Banning was described in reference to the plat of the Norway survey. The description of the land contained in the patent was as follows, to-wit:

> "Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands, returned to the General Land Office by the Surveyor General." [R. 660.]

The official plat of the survey of said land shows all of Lot 1, Section 8, Township 5 South, as bordering on

navigable water of the inner bay of San Pedro (Petitioners' Ex. D; Book of Exhibits 31). Only a small portion of Mormon Island was and is above the line of mean high tide of the Pacific Ocean. The portion of the island which is upland, or above the line of mean high tide, is a long, narrow strip or parcel of land in the central part of the island. The land involved in this action is situated at the north end of the island and lies between the line of mean high tide of the Pacific Ocean and the meander line as described by the courses and distances in the field notes of the Norway survey.

The Respondent's Title to the Land Involved in This Action.

The land involved in this action is, in fact, tideland. It is situated below the line of mean high tide of the Pacific Ocean, and prior to the reclamation of the island in the year 1909 it was regularly covered and uncovered by the ebb and flow of the tide. This point will be more fully discussed in a subsequent portion of this brief.

Upon its admission into the Union the State of California became the owner of all the tidelands within its borders by virtue of its sovereignty, save and except such tidelands as may have been granted away prior to the Treaty of Guadalupe Hidalgo.

Knight v. U. S. Land Assn., 142 U. S. 161;

Shively v. Bowlby, 152 U. S. 1;

United States v. Mission Rock Co., 189 U. S. 391;

People v. Kerber, 152 Cal. 731;

Ross v. Burkhard Investment Co., 90 Cal. App. 201.

By act of the legislature of the State of California, approved and made effective May 1, 1911 (Stats. of California, 1911, p. 1256), and by act of the legislature of said state amendatory thereof, approved April 20, 1917, effective July 27, 1917 (Stats. of California, 1917, p. 159), the State of California granted to respondent, the City of Los Angeles, a municipal corporation, and to its successors, all of the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all tide and submerged lands, whether filled or unfilled, within the then boundaries of the City of Los Angeles and situated below the line of mean high tide of the Pacific Ocean and of any harbor, estuary, bay or inlet of the Pacific Ocean within the said boundaries of the City of Los Angeles. These acts of the legislature hereinabove referred to conveyed the title to all of the tidelands of the State of California within the then boundaries of the City of Los Angeles to the respondent herein, which it now owns and holds in its governmental capacity in trust, which is identical with the public trusts upon which the state had originally received and held said lands up to the time of its grant of the same to the City of Los Angeles.

City of Los Angeles v. Anderson, 206 Cal. 662, 668;

Patton v. City of Los Angeles, 169 Cal. 521, 524;

Los Angeles v. Pacific Coast S. S. Co., 45 Cal. App. 15.

The Claim of Petitioners That the "Issuance of the Government Patent Conveying Mormon Island Was a Conclusive Adjudication of All Supporting Facts, Such as Character and Boundaries of Land Described Therein, and Same Is Not Subject to Review for Error of Fact in Any Court."

One of the questions, if not the principal question, involved in this action is, What line constitutes the boundary line of the land conveyed to Banning by the patent?

The respondent contends that the boundary line of the land conveyed to Banning by the patent is the line of mean high tide of the Pacific Ocean.

The petitioners contend that the boundary line is the meander line as described by the courses and distances in the field notes of the Norway survey and that the patent to Banning is conclusive evidence of such line. Petitioners also contend that the approval by the officials of the Land Department of the Norway survey constituted an adjudication by that department that all the land within the exterior boundaries of the meander line, as described by the courses and distances in the field notes, was upland and the patent conveyed all of the land within those lines to Banning.

Petitioners also contend that the meander line, as described by the courses and distances in the field notes of the Norway survey, is a fixed and permanent line and that it constitutes the boundary line regardless of the fact that the actual shore line or water line may have shifted and changed from time to time as a result of the action of the tide.

As opposed to the contentions of the petitioners, the points urged by, and the contentions of, the respondent in the courts below, and also urged here, are as follows:

1. When the United States conveys a tract of public land by patent, referring to an official plat of the survey showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance and the water itself constitutes the boundary line.

2. The traverse lines of the Norway survey are meander lines, and such meander lines were not intended to and do not constitute the actual boundary line between tideland and upland on Mormon Island, the line of mean high tide of the Pacific Ocean being the actual boundary line between tideland and upland.

3. The land involved in this action is tideland and therefore was not, subsequent to the 9th day of September, 1850, public property of the United States; the same was owned and held by the State of California by virtue of its sovereignty. The United States had not at any time subsequent to September 9, 1850, jurisdiction to patent, grant or transfer said lands to William Banning or to anyone else, and said patent, in so far as it attempted to grant or convey lands below the line of mean high tide of the Pacific Ocean, was invalid and void.

The petitioners refer in their brief to certain alleged admissions and concessions by respondent, and quote certain excerpts from respondent's brief filed in the Circuit Court, and infer that the respondent has conceded and admitted that the boundary line of the land conveyed to Banning is the meander line of the Norway survey. The position of the respondent on this question is now, and

has been at all times, that the boundary line of the land conveyed to Banning by the patent is the water line of the inner bay of San Pedro. In this connection we call the court's attention to respondent's specification of errors, numbers I, III, and IV, which are as follows, to-wit [R. 694-695]:

> I. The court erred in finding and determining that the Land Department of the United States Government had jurisdiction to determine the character of the land involved in this action and its findings and the patent issued to William Banning are conclusive, and that said patent conveyed title to the land involved in this action to the said William Banning.
>
> III. The court erred in finding and determining that the meander lines as surveyed and established by the surveyor Norway constituted the boundary line of the area conveyed to William Banning by the patent.
>
> IV. The court erred in finding and determining that the meander lines as surveyed *and established by* the surveyor Norway constituted the boundary line between tideland and upland.

The respondent is seeking a judicial determination of the question as to what line constitutes the boundary line of the land conveyed to Banning by the patent, and we submit that such an action is not a collateral attack upon a patent as contended by the petitioners. This point is so well settled and the matter is so elementary that we will not take up the time of this Honorable Court with citation of authorities in support thereof.

The Norway Survey.

Mormon Island was not included in any Spanish or Mexican grant. (See *DeGuyer v. Banning*, 167 U. S. 723.) William Banning sought to acquire title to all the upland on Mormon Island under the pre-emption laws of the United States enacted April 24, 1820. On March 10, 1880, a contract was entered into between Theodore Wagner, Surveyor General of the United States for California, and one W. H. Norway, wherein Norway was employed to survey Mormon Island. The survey was commenced on May 22, 1880 and completed May 24, 1880. [R. 683.]

The surveyor states in the field notes [R. 684] that he established meander corner or station No. 1 at "ordinary high water mark." The location of station No. 1 is also described by courses and distances in the field notes from certain artificial monuments described in said notes. The surveyor then, from meander corner No. 1, ran a traverse around Mormon Island which he designated as a "meander" [R. 684]. There are fourteen stations in the traverse line, the locations of which are described by courses and distances in the field notes [R. 684]. The surveyor states [R. 684] that all of the stations are located at "ordinary high water mark." He states that he "meandered around the island at **ordinary high water mark.*"

On the official plat of the survey (Book of Exhibits 31), in the description of the locations of the fourteen stations is the following: "Beginning at Meander Corner 1 at ordinary high water mark; thence along the shore of the

*All italics ours unless otherwise specified.

island." The locations of the fourteen stations are then set forth by courses and distances.

The uncontradicted evidence in this case shows that if station No. 1 of the survey was located at the point described in the field notes and the traverse line thence run according to the courses and distances in the field notes, the line as thus run would not coincide with the line of ordinary high water mark—the line of mean high tide of the Pacific Ocean—being the line as shown on the official plat of the survey as constituting the boundary line of the tract of land described in the patent. The line as thus run would be below the line of ordinary high water mark [R. 328-329].

The field notes of the survey, together with the official plat of said survey, were returned to the office of the surveyor general, and the land as shown on the plat was designated at Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian. The plat shows the land bounded on all sides by the water of the inner bay of San Pedro.

The Traverse Lines of the Norway Survey Are Meander Lines.

Meander lines have been defined by this court in the case of *Niles v. Cedar Point Club*, 175 U. S. 300, as

> "lines which course the banks of navigable streams or other navigable waters."

It is conceded by the petitioners that at the time of the Norway survey Mormon Island was entirely surrounded by navigable water. We call the court's attention to Respondent's Ex. 11 (Book of Exhibits 13), which is a

photograph of the inner bay of San Pedro, which photograph was taken in the year 1908. This photograph shows Mormon Island when it was in the state of nature. It will be readily conceded, as indeed it must be, that the shore line of Mormon Island was a very irregular line. An examination of the official plat of the Norway survey, to-wit, Petitioners' Ex. D (Book of Exhibits 31) and the photograph, to-wit, Respondent's Ex. 11 (Book of Exhibits 13), conclusively establishes the fact that the surveyor Norway did not intend to delineate the exact shore line, but intended to and did run a traverse line around the island which, when closed and a plat of the survey made, would show the general form of the island. The letter "A" on the photograph indicates the extreme northerly end of Mormon Island.

The petitioners allege as a special defense to the action that the island was surveyed by Norway "in strict conformity with the printed manual of surveying instructions issued by the General Land Office" [R. 45-46]. The printed manual of surveying instructions provided that all navigable rivers and other navigable water should be meandered [R. 676]. The surveyor Norway, after describing the point where he started his traverse of Mormon Island, and after describing the location of meander corner No. 1, makes the following statement: "From this point I meander around the Island at ordinary high water mark" [R. 684]. The courses and distances of the traverse of the Norway survey, as shown on the plat (Petitioner's Ex. D; Book of Exhibits 31), are designated as "meanders of the shore of Mormon Island." From the above it is clear that Norway followed instructions and that in his survey of Mormon Island he intended to and did meander the shore thereof.

The petitioners do not contend that the traverse lines as established by Norway are not "meander lines," but argues that there is something peculiar about the meander lines as established by Norway which makes such lines boundary lines. We are unable to see any distinction between the meander lines which have been surveyed by other surveyors employed by the federal government, and which were involved and referred to in the cases cited by the Circuit Court of Appeals in its opinion in this case and in the cases which will be hereinafter referred to by the respondent in support of its contention that a meander line does not constitute a boundary line between tideland and upland, and the meander line surveyed around Mormon Island by the surveyor Norway.

The Meander Line of the Norway Survey Was Not Intended as a Boundary Line.

It has been uniformly held by both the federal and state courts that meander lines are run in surveying fractional portions of public lands bordering upon navigable streams or other bodies of navigable water, not as boundaries of the tract but for the purpose of determining the quantity of upland granted to, and to be paid for by, the purchaser. The waters themselves constitute the true boundary line between tideland and upland.

Railroad Company v. Schurmeir, 7 Wall. 272;
Jefferis v. East Omaha Land Co., 134 U. S. 178;
Hardin v. Jordan, 140 U. S. 371;
Mitchell v. Smale, 140 U. S. 406;
Horne v. Smith, 159 U. S. 40;
Producers Oil Co. v. Hansen, 238 U. S. 325;

U. S. v. Lane, 260 U. S. 662;

United States v. Boynton, 53 Fed. (2d) 297;

Coburn v. San Mateo County, 75 Fed. 520.

Decisions of California courts:

Anderson v. Trotter, 213 Cal. 414;

Craig v. White, 187 Cal. 489;

Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652; certiorari denied, 254 U. S. 636;

Curtis v. Upton, 175 Cal. 322;

DeWatson v. San Pedro, 169 Cal. 520;

Kimball v. McKee, 149 Cal. 435;

Kirby v. Potter, 138 Cal. 686;

Hendricks v. Feather River Canal Co., 138 Cal. 423;

Matteson v. McCarty, 98 Cal. App. 45;

City of Los Angeles v. Duncan, 130 Cal. App. 11.

In the case of *Hardin v. Jordan, supra,* the court said:

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters

whose margins are thus meandered; and that the waters themselves constitute the real boundary. Railroad Co. v. Schurmeir, 7 Wall. 272; Jefferis v. East Omaha Land Co., 134 U. S. 178; Middleton v. Pritchard, 3 Scam. 510; Canal Trustees v. Haven, 5 Gilm. 548, 558; Houck v. Yates, 82 Illinois 179; Fuller v. Dauphin, 124 Illinois 542; Boorman v. Sunnuchs, 42 Wisconsin 223, 235; Pere Marquette Boom Co. v. Adams, 44 Michigan 403; Clute v. Fisher, 65 Michigan 48; Ridgeway v. Ludlow, 58 Indiana 248; Kraut v. Crawford, 18 Iowa 549; Forsyth v. Smale, 7 Bissell 201; Rev. Stat. Secs. 2395, 2396."

In the case of *Kimball v. McKee, supra,* at page 443, the court said:

"* * * Besides, the meander line is not itself the shore line. It is only a means of measuring and correctly locating the shore line. The survey itself extends to the line of ordinary high tide, and all the land included within that line passes to the patentee of the subdivisions shown to be so bounded by the township plat. Mr. Kimball, therefore, owns to the ocean shore on the south half of his claim. Nothing can stop him short of that natural boundary. Not even the government can come between him and the actual shore line * * *."

The undisputed and uncontradicted evidence in the case at bar shows that the meander line, as described by the courses and distances in the field notes of the Norway survey, is below the line of mean high tide of the Pacific Ocean. This point will be more fully discussed in a subsequent portion of this brief.

THE SAN PEDRO R. R. CASE, 182 CAL. 652, CERTIORARI DENIED, 254 U. S. 636.

All of the points urged by the petitioners herein have been decided adversely to their contention by the Supreme Court of the State of California in the case of *Los Angeles v. San Pedro R. R. Co.*, 182 Cal. 652. That action was one to quiet title to a small parcel of tideland located directly across the channel from Mormon Island. It was contended in that case that the survey and the patent which had been issued were conclusive evidence of the boundary line. The Supreme Court of the State of California held that the meander line of the government survey did not constitute the boundary line, but that the line of mean high tide of the Pacific Ocean constituted the true boundary. In that case the court said (p. 654):

> "* * * The law is thus stated in the syllabus to the opinion of the supreme court of the United States in Jefferis v. East Omaha Land Co., 134 U. S. 178 (33 L. Ed. 872, 10 Sup. Ct. Rep. 523, see, also, Rose's U. S. Notes): 'Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the water-course, and not the meander line, as actually run on the land, is the boundary.' See, also, Railroad Co. v. Schurmeir, 7 Wall. 272 (19 L. Ed. 74) * * *."

The petitioners argue that the *San Pedro R. R.* case is not in point for the reason that there was no attempt in that case to disturb or reject any of the meander corners of the survey.

A meander corner established by a surveyor on land bordering upon navigable water is no more fixed and permanent than a meander line. In the case of *United States v. Boynton;* 53 Fed. (2d) 297, the court said:

> "* * * Because a meander line, as carried into field notes, shows *corners, posts, monuments,* and courses, does not result in the line so delineated becoming definite and fixed * * *."

The rule that a meander line of a government survey of land bordering on navigable water does not constitute the boundary line but that the water itself is the actual boundary line, has been applied by both the federal and state courts even though the result thereof was to add to the land enclosed within the meander lines of the survey an area as large as one hundred acres. In the case of *Anderson v. Trotter, supra,* the court referred to certain decisions of both the federal and state courts wherein the above rule had been applied which resulted in each instance in the addition of a large number of acres to the land which was inclosed by the meander line, and in that case the court said (pp. 424-425):

> "In deciding the Lane case the court used the following language, which is pertinent here: 'The official plat made from such survey does not show the meander line, but shows the general form of the lake adduced therefrom and the surrounding fractional lots adjoining and bordering on the same. The patents, when issued, refer to this plat for identification of the lots conveyed, and are equivalent to, and have the physical effect of a declaration that they extend to, and are bounded by the lake or stream.' This language is quoted from the case of Mitchell v. Smale, 140 U. S. 406 (35 L. Ed. 442, 11 Sup. Ct. Rep. 819, 840). The court then proceeds: 'While

the facts are somewhat different, and the extent of the omission somewhat greater, we think the general rule should likewise be applied in the remaining two cases. The Warren survey and plat here indicate an area of about 271 acres in the fractional subdivisions conveyed. The lands added by the new survey constitute a compact body of 97.64 acres, 65.77 acres of which are involved in the Greene case and 14.13 acres in the Loucks case, having the outline of a long and rather irregular crescent, with the outer curve next to the water,' etc.

"In the case of Barringer v. Davis, 120 N. W. 65, a case referred to in the citations which we have given, it is held that the meander line is not the limit of the land conveyed when the lands border upon a body of water, but that the shore line constitutes the true boundary. On pages 66 and 67 of the volume cited are two maps or plats showing the lands in controversy. The original survey made in 1875 called for 154 acres. A resurvey made in 1901 added 104 acres. The court held that the original patents conveyed the lands in controversy. This case is also reported in 141 Iowa 419, 433. It would appear from the opinion and the plats in the Barringer case that the acreage involved was considerably larger than that with which we are dealing.

"In the case of Rue v. Oregon & Washington R. Co., 109 Wash. 436 (186 Pac. 1074), the Supreme Court of Washington held that 43 acres of land lying between the meander line and the shore line was insufficient upon which to hold that the survey was fraudulent or so palpably erroneous as to justify the interference of a court of equity. Other questions were involved in that case, but the principles there stated are applicable here.

"In the case of Mitchell v. Smale, *supra*, the patent covered 4.53 acres. As platted it was held to carry

title to 25 acres. In Sherwin v. Bitzer, 97 Minn. 252 (106 N. W. 1046), the title to the riparian owner of 143.93 acres of land between the meander line and the lake in a different section was sustained where his patent called for but 68.06 acres. As reported in 106 N. W. 1046, this case exhibits plats illustrating the questions involved and the lands in dispute.

"In Schlosser v. Cruickshank *et al.*, 96 Iowa 414 (65 N. W. 344), the opinion discloses that there were 100 acres between the meander line and the shore of the lake. It was there held that the patent under the cases which we have cited carried the boundary line to the shore of the lake.

"In Schmitz v. Klee, 103 Wash. 9 (173 Pac. 1026, 1027), the meander line left between it and the shore line 30.71 acres of high land. It was held that the patent conveyed the intervening tract. A plat showing the unsurveyed land appears on page 1027 of the volume cited.

"In Greene *et al.* v. United States, 274 Fed. 145, 149, and Loucks *et al.* v. United States (U. S. v. Lane), 260 U. S. 662 (67 L. Ed. 448, 43 Sup. Ct. Rep. 236), are quoted practically all the cases which we have cited, and where a larger tract of land was omitted than lies between the Tucker meander line and the shore of Clear Lake, the court said: 'The case is well within the rule that a meander line is not to be considered as a line of boundary where the plat of survey shows a body of water as the boundary,' etc."

If the rule is applied in cases where it results in an addition to the land within the meander lines, it should likewise be applied where it results in excluding land which is enclosed within the meander lines of the government survey.

The Claim of the Petitioners That "The Circuit Court of Appeals Erred in Ruling That, as Matter of Law, the Traverses of the Norway Plat Were Not Boundary Lines and That the Meander Corners Could Be Lawfully Rejected."

The Circuit Court of Appeals did not rule that "as a matter of law" the traverses of the Norway survey were not boundaries. The Circuit Court in its opinion said:

> "It is clear from the plat that the lines in question were meander lines, and therefore that the boundary line of the land covered by the patent is the shore line of Mormon Island and not the traverse lines of the patent." [R. 716.]

From the uncontradicted evidence in this case we fail to see how the court could have reached any other conclusion. The petitioners argue that it is always a question of fact as to whether or not a meander line constitutes the boundary line.

We do not wish to be understood as contending that the rule upon which the respondent relies—that a meander line run in surveying fractional portions of public lands bordering on navigable water does not constitute a boundary line—is not without limitation.

A meander line may constitute a boundary line if there is some express provision in the grant or patent which clearly and conclusively indicates that such is the intention. There is no provision in the patent to Banning which indicates that the meander line as described by the course and distances in the field notes of the Norway survey was intended as the boundary. On the contrary, the field notes and the plat clearly and conclusively show that "ordinary high water mark" was intended as the boundary. On the plat (Book of Exhibits 31) the surveyor states,

"corner 1 at ordinary high water mark." The field notes refer to all the stations in the traverse line, there being a total of fourteen, as being located "at ordinary high water mark." The plat shows the water as the boundary.

It has been uniformly held by both the federal and state courts that where a patent refers to a plat which shows the land bordering on navigable water, the water, and not the meander line of the survey, is intended as the actual boundary line.

REFERENCE TO ACREAGE IN A PATENT IS NOT CONTROLLING IN THE MATTER OF BOUNDARIES.

Petitioners refer to the fact that the patent contains the statement, "containing eighteen and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands," and argue (Brief p. 93) that this shows an intent to make the meander line the boundary.

Petitioners also argue that the phrase "according to" in the descriptive clause of the patent refers to acreage and not to the plat. We are convinced that counsel for petitioners cannot be serious in their contention in this regard. The language contained in the patent is "according to the Official Plat of the Survey of said Lands," and how this language could be construed to mean or refer to acreage is beyond our comprehension.

It is well settled that the fact that acreage is referred to in a patent does not show an intent to limit the tract of land to the meander line of the survey or to make the meander line the boundary line of the tract. For authorities in support thereof we call the court's attention to the cases of

Greene v. United States, 274 Fed. 145;
Anderson v. Trotter, 213 Cal. 414.

In the case of *Greene v. United States, supra*, the court said (p. 150):

> "That acreage is not controlling in limiting the grant is clearly shown by the above case (Mitchell v. Smale, 140 U. S. 406, 412, 11 Sup. Ct. 819, 840, 35 L. Ed. 442). There are many others of the same purport.
>
> "In Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1251, the patent called for a tract of 86.06 acres. The natural object was held to be the boundary and to carry with it 143 acres.
>
> "Where the survey mentioned in a patent calling for 80 acres depicted a lake as a boundary, and the meander line did not coincide with the lake shore, the lake was decided to be the boundary, and the patent was held to convey 100 acres lying between the meander line and the lake. Barringer v. Davis, 141 Iowa 428, 120 N. W. 65. See, also, Lindsey v. Hawes, 2 Black 554, 560, 17 L. Ed. 265; Brown v. Huger, 21 How. 305, 16 L. Ed. 125; St. Clair v. Lovingston, 23 Wall. 46, 63, 23 L. Ed. 59; Grand Rapids & Indiana R. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85; St. Anthony Falls Water Co. v. Board, etc., 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; Chapman & Dewey v. St. Francis Levee District, 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564."

Another exception to the rule is that if there is no body of water corresponding to the meander line to which the ownership of the holders of the adjoining tracts of land can extend, then the meander line constitutes the boundary line of the land conveyed.

Jeems Bayou Fishing & Hunting Club v. United States, 260 U. S. 561, 67 L. Ed. 402;

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. Ed. 800;

Niles v. Cedar Point Club, 175 U. S. 300, 44 L. Ed. 171;

Horne v. Smith, 159 U. S. 40, 40 L. Ed. 68.

No such facts exist which bring the case at bar within the exception to the rule herein last above referred to. It is conceded by petitioners that the inner bay of San Pedro was in existence at the time of the Norway survey, and, of course, is still in existence.

Another exception to the rule is, if a meander line is established at such excessive distances from the actual shore as to leave between its course and the shore an excess of unsurveyed land so great as clearly and palpably to indicate fraud or mistake in the survey, then the court will for *equitable reasons* treat the meander line as a boundary line.

Producers Oil Co. v. Hazen, 238 U. S. 325, 59 L. Ed. 1330;

Anderson v. Trotter, 213 Cal. 414.

The petitioners rely upon the case of *Producers Oil Co. v. Hazen, supra*, in support of their contention that it is a question of fact as to whether or not a meander line constitutes a boundary line. The facts in the *Producers Oil Co.* case were such as to bring it within the exception to the rule herein last above referred to, and in that case the court said:

"In the instant case we find a survey of improved lands made at the express request of the occupant to whom they were substantially patented; a grant from the United States specifying the exact number of

> acres conveyed; a positive declaration in field notes that land to the north lies outside the traverse lines; admission that excluded area contains not less than 40 acres of high ground, and evidence of large timber growing there; official plat delineating the surveyor's courses and specifying acreage of the several subdivisions, which cannot be said to indicate a water boundary beyond possible question. Outside the southern traverses of this plat, in space designated 'Open Lake,' lie 300 acres of fast land surveyed by Barbour in 1896. * * *"

also:

> "'It is admitted by both parties that the land in controversy is high land and was high land at the date that Bristol made his survey in 1871.'"

In the case of *Anderson v. Trotter, supra,* the Supreme Court of the State of California, in referring to the exception to the general rule herein last above referred to, said (p. 420):

> "The exceptions to this rule include references to bodies of water which do not exist, and to tracts of land so large as to palpably indicate fraud or such a mistake in the survey that a court will, for equitable reasons, treat the meander line as the boundary. * * *."

The court in the same case referred to certain decisions wherein the exception to the general rule herein last above referred to had been applied. In regard to those cases, where the exception to the general rule herein last above referred to has been applied, the court said (pp. 423-424):

> "Appellant bases her claim for reversal upon the cases of Jeems Bayou Fishing & Hunting Club *et al.*

v. United States, 260 U. S. 561 (67 L. Ed. 402, 43 Sup. Ct. Rep. 205); Security Land & Exploration Co. v. Burns, 193 U. S. 167 (48 L. Ed. 662, 24 Sup. Ct. Rep. 425); *Id.*, 87 Minn. 97 (94 Am. St. Rep. 684, 63 L. R. A. 157, 91 N. W. 304); Lee Wilson & Co. v. United States, 245 U. S. 24 (62 L. Ed. 128, 38 Sup. Ct. Rep. 21); Producers Oil Co. v. Hanzen, 238 U. S. 325 (59 L. Ed. 1330, 35 Sup. Ct. Rep. 755); French-Glenn Livestock Co. v. Springer, 185 U. S. 47, 46 L. Ed. 800, 22 Sup. Ct. Rep. 563); Scott v. Lattig, 227 U. S. 229 (44 L. R. A. (N. S.) 107, 57 L. Ed. 490, 33 Sup. Ct. Rep. 242). A review of these cases, however, we think shows that they are readily distinguishable from the facts found by the court in this case. In the Jeems Bayou Fishing & Hunting Club Case, *supra*, a compact body of land of 500 acres was omitted from the original survey. The court there held that the omission of such a large tract of land indicated a deliberate purpose on the part of the surveyor and rendered his actions fraudulent. In the case of Security Land & Exploration Co., *supra*, the patent called for 140 acres. The omitted land comprised 570 acres, which, according to the language of the court, indicated that the surveyor never saw the grant and never saw the lake he pretended to have measured. In the case of Lee Wilson & Co., *supra*, the controversy involved 853 acres of unsurveyed swampland. In the French-Glenn Livestock Co. case, *supra*, a large tract of land was involved and it was found that there was no body of water to meander. The case of United States v. Lane, 260 U. S. 662 (67 L. Ed. 448, 43 Sup. Ct. Rep. 236), where the facts are more similar to those involved here, held, quoting from the syllabus: 'A patent to land under a survey along the margin of a lake, which purports to follow such

> margin, will carry title to the water's edge, where the land is wild and remote and of little value, and numerous ravines run into the land from the water, so that the running of the line on the water's edge would have been difficult, while the survey follows with fair accuracy the contour of the lake, although in a length of 4000 feet, with an indicated area of 271 acres, about 98 acres are outside of the meander line.' The opinions in the Jeems case, *supra*, and the Lane case, *supra*, were written by the same justice. In the former case the size of the tract of land omitted was held to indicate fraud, while in the Lane case 98 acres omitted were not held to constitute a sufficiently large body of land to indicate fraud or deliberate mistake, etc."

There are no facts which bring the case at bar within the exception to the rule herein last above referred to. It is not contended by petitioners herein that there is any upland beyond the meander line of the Norway survey and the inner bay of San Pedro.

There being no facts which bring the case at bar within any of the exceptions to the rule upon which the respondent relies, we fail to see how the Circuit Court could have arrived at any other conclusion than that the traverse lines of the Norway survey were *in fact* meander lines, and as such were not intended as and did not constitute the boundary line of the tract of land conveyed to William Banning.

Petitioners state that the upland on Mormon Island is flat and therefore there was no reason why the surveyor could not run his traverse lines around the island coincident with the line of mean high tide of the Pacific Ocean or the ordinary high water mark, and therefore the me-

anders at Mormon Island are essentially boundaries. The question as to whether a meander line of a government survey run along a tract of land conveyed by patent and bordering on navigable water is a boundary line, or whether the water is the boundary line, is not determined by the contour of the surface of the upland within the exterior boundaries of the meander line.

Counsel for petitioners also make the bold assertion that there were no "tongues or projections" extending beyond the general contour of the island. The photograph of Mormon Island (Respondent's Ex. 11; Book of Exhibits 13) refutes this assertion. A glance at that photograph will show that the contour of the shore line is a very, very irregular line.

The uncontradicted evidence in this case shows that there was at all times prior to the reclamation of the island a slough at the northerly end of the island extending from the westerly side to the easterly side thereof, which slough severed the island into two parts. This slough was of sufficient size and depth that boats could be and were rowed through it. The plat of the Norway survey does not show this, although it appears without contradiction that the slough existed at the location hereinabove referred to.

Petitioners' Argument in Regard to Meander Lines Constituting Boundary Lines, Inconsistent.

Petitioners argue (Brief p. 92) that the meander lines as surveyed by Norway constitute the boundary line, and at page 96 of their brief petitioners argue that "meander lines are *prima facie* evidence of the shore line location," and under that heading cite authorities in support of their argument that meander lines are only *prima facie* evidence of the boundary line.

Assuming, without admitting, that meander lines are *prima facie* evidence of the shore lines, the question of whether or not such meander lines are *prima facie* evidence of such shore lines is not now before this court for its consideration and decision. That question is one which should be presented to the trial court at the time of the retrial of this action. Assuming that meander lines are *prima facie* evidence of the shore line, it then would become the duty of the trial court to determine whether or not evidence offered or to be offered by the respondent is sufficient to overcome such *prima facie* evidence. This question was not presented to or passed upon by the trial court, and we believe that it is well settled that it is only in exceptional cases that this court will review questions which have not been passed upon by the trial court.

Petitioners Claim That "The Circuit Court of Appeals Erred in Rejecting the Authority of Such Cases as Knight v. United Land Association and Cragin v. Powell and in Holding That the Federal Patent Is Not Conclusive Evidence of the Correct Location of the Boundary Defined by Ordinary High Water Mark."

The cases cited and relied upon by petitioners are not applicable to the facts involved in this action. None of those cases involve the question of the jurisdiction of the Land Department to establish a fixed and permanent boundary line between tideland and upland, or involve the question of the jurisdiction of that department to make a conveyance of tideland which is owned and held by a sovereign state, and, as said by this court in the case of *Hardin v. Shedd*, 190 U. S. 508, 47 L. Ed. 1156:

"* * * When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the ground for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. *In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union* * * *."

The cases upon which the petitioners rely most strongly in support of their contention that the Land Department has jurisdiction to establish the boundary between tideland and upland and that the running of a meander line on public land bordering on navigable water constitutes the establishment of such boundary line, are:

United States v. Coronado Beach Co., 255 U. S. 472; *Knight v. United Land Assn.*, 142 U. S. 161; *Cragin v. Powell*, 128 U. S. 691; *Heath v. Wallace*, 138 U. S. 573; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *West v. Standard Oil Co.*, 278 U. S. 200; *Stoneroad v. Stoneroad*, 158 U. S. 240; *Catholic Bishop of Nesqually v. Gibbons*, 158 U. S. 155. Also, the California cases of *Jameson v. James*, 155 Cal. 275; *Foss v. Johnstone*, 158 Cal. 119.

The case upon which petitioners rely most strongly, in fact almost entirely, in support of their contention that the Land Department has jurisdiction to establish the boundary line between tideland and upland and that the patent issued to William Banning was conclusive, is the case of *Knight v. United Land Assn., supra.* That case is not applicable to the survey in question in this case for the reasons that have been so ably pointed out by the

Circuit Court of Appeals in its opinion in this case. That case involved the question of the ownership of certain tidelands in the City of San Francisco to which the City of San Francisco, as successor of the Mexican pueblo by that name, had acquired title from Mexico prior to the Treaty of Guadalupe Hidalgo. The question, and the only question, involved in the *Knight* case was whether a Mexican grant confirmed by the United States would or would not include lands below high-water mark. In that case the court said (p. 184):

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisidiction in that behalf as the original states possess within their respective borders. Martin v. Waddell, 41 U. S. 16 Pet. 367, 410 (10: 997, 1012); Pollard v. Hagan, 44 U. S. 3 How. 212, 229 (11:565, 573); Goodtitle v. Kibbe, 50 U. S. 9 How. 471, 478 (13:220, 223); Mumford v. Warwell, 73 U. S. 6 Wall. 423, 436 (18:756, 761); Weber v. State Harbor Comrs., 85 U. S. 18 Wall. 57, 65 (21:798, 801). Upon the acquisition of the territory from Mexico the United States acquired the title to tidelands equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory. Authorities last cited. *But this doctrine does not apply to lands that had been previously granted to other parties by the former government,* or subjected to trusts which would require their disposition in some other way. San Francisco v. LeRoy, 138 U. S. 656 (34:1096). For it is equally well settled that when the United States acquired Cali-

fornia from Mexico by the Treaty of Guadalupe Hidalgo (9 Stats. at L. 922), they were bound, under the 8th article of that treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. Teschemacher v. Thompson, 18 Cal. 11; Beard v. Federy, 70 U. S. 3 Wall. 478 (18:88).

"Irrespective of any such provision in the treaty, the obligations resting upon the United States, in this respect, under the principles of international law, would have been the same. Soulard v. United States, 29 U. S. 4 Pet. 511 (7:938); United States v. Perchman, 32 U. S. 7 Pet. 51, 87 (8:604, 617); Strother v. Lucas, 37 U. S. 12 Pet. 410, 436 (9:1137, 1147); United States v. Repentigny, 72 U. S. 5 Wall. 211, 260 (18:627, 643).

"These observations lead directly to the determination of the force and effect of the title of the pueblo of San Francisco, derived from the former government of Mexico, as opposed to the title which it is insisted passed to the State of California upon its admission into the Union by virtue of its sovereignty over all tidelands in the state below the high-water line, even including such as are situated within the limits of the pueblo.

"If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name; that it is within the four square leagues *described in the decree of the United States Circuit Court* for the District of California, entered May 18, 1865; that that court decided and decreed that the claim of title was valid under the laws of Mexico; that the official survey of the United States officers is correct and *followed the decree of confirmation;* and that the patent of the government of the United

States, following the survey and decree, embraced within its calls the property in dispute; We think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.

* * * * * * * *

"* * * When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. Townsend v. Greeley, 72 U. S. 5 Wall. 326, 337 (18:547, 549). The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and, of course, of the city of San Francisco as successor to the pueblo, were superior to any subsequently-acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it, the United States, through its tribunals, recognized the validity of that title at the date of the treaty—at least recognized the validity of the claim to the title as then existing, and in execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement * * *."

In connection with the *Knight* case we desire to call the court's attention to a statement of this court in the case of *Shively v. Bowlby*, 152 U. S. 1, wherein the court said:

> "* * * In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, *did or did not include any lands below high water mark, was treated as depending on the terms of the decree of confirmation by a court* of the United States under authority of Congress. By the application of that test, no such lands were held to be included in United States v. Pacheco, 69 U. S. 2 Wall. 587 (17:865) and some such lands were held to be included in Knight v. United Land Assn., 142 U. S. 161 (35:974) * * *."

The facts and questions involved in the case of *United States v. Coronado Beach Co.*, 255 U. S. 472, are the same as those in the *Knight* case. In the *Coronado Beach Co.* case the company derived its title from a Mexican grant of May 15, 1846, to one Carillo, a Mexican citizen, the company having succeeded to his rights. One of the questions involved in that case was whether the company owned the tideland in front of the upland on the island. The petition to the board of commissioners to settle private land claims for confirmation of the Mexican grant was denied, but on appeal to the District Court of the United States the title to the land was declared good and confirmed and thereafter a patent was issued thereto, including the tidelands involved in that action. The d e was filed on January 12, 1867, and on June 11, 1869, a patent was issued to the tideland involved in the action, together with other land. In the *Coronado Beach Co.* case it was contended by the United States that, by reason of the fact that California was admitted to the Union in

1850, the state acquired title to all of the tidelands in said state prior to the date of the decree of the District Court confirming the Mexican grant. This court pointed out in the *Coronado Beach Co.* case that the title of the State of California to tideland was subject to prior Mexican grants and that the decree of confirmation related back to the date of the original grant. In the *Coronado Beach Co.* case this court said:

> "The jurisdiction of the decree and the validity of the patent, so far as they cover the tidelands, is denied by the United States, a special reason being found in the fact that California became a state in 1850, and thereby acquired a title to the submerged lands before the date of the decree. *But the title of the state was subject to prior Mexican grants.* * * * The title of California was in abeyance until those issues were determined, *as the decree related back to the date of the original grant* * * *."

The question as to whether or not a meander line, run in surveying public land bordering on navigable tidewater constitutes the *boundary line between tideland and upland,* is not presented in any of the other cases cited and relied upon by petitioners, and neither is the question of the jurisdiction of the Land Department to fix and establish the permanent boundary line between tideland and upland, nor the question as to whether or not the Land Department has jurisdiction to issue a patent to tideland, which land is at the time of the issuance of such patent property of the state in which such tideland is situated, presented in any case relied upon by petitioners.

The case of *Catholic Bishop of Nesqually v. Gibbons, supra,* involved the question of the title to a parcel of land which the plaintiff claimed by virtue of an Act of Con-

gress establishing the territorial government of Oregon, wherein it was provided that title to the land not exceeding six hundred and forty acres, which was at that time occupied as missionary stations, should be confirmed and set apart to the several religious societies to which the said missionary society belonged. No question involving meander lines or the power of the Land Department to dispose of tideland was involved in that action.

The question presented in the case of *Russell v. Maxwell Land Grant Co., supra,* was similar to the question presented in the *Knight* case. In the *Russell* case the title to the land which was in dispute had been granted to private parties by the territorial governor of New Mexico prior to the Treaty of Guadalupe Hidalgo. Thereafter Congress passed an act confirming the grant with the boundary specified in the act. Thereafter the Surveyor General caused a survey of said land to be made, which survey was returned to the Land Department giving in detail the boundary of said tract. In that action the court held that the survey was not open to attack and that any doubt which may have existed as to the limits of the grant was settled by the act of confirmation. No question regarding a meander line was involved in that action.

The case of *Stoneroad v. Stoneroad, supra,* involved the question as to whether or not it was necessary that a survey should be made of the land which had been granted to private parties prior to the Treaty of Guadalupe Hidalgo, and which grant had been confirmed by act of Congress in order to separate the land embraced in such grant from the public domain.

The cases of *Cragin v. Powell, supra; Heath v. Wallace, supra,* and *Foss v. Johnstone, supra,* involved the survey and segregation of swamp and overflow lands. The

officials of the Land Department were expressly authorized by statute, to-wit, Act of September 28, 1850, 9 Stats. 519, 43 U. S. C. A. 982, to identify, survey and segregate swamp and overflow land. Even in the case of a survey and segregation of swamp and overflow land from dry land the identification, survey and segregation of such land required the joint act of both state and federal authorities. (Act of July 23, 1866; 14 Stats. 219, 43 U. S. C. A. 987; *Wright v. Roseberry*, 121 U. S. 488; *Tubbs v. Wilhoit*, 138 U. S. 134; *McCabe v. Goodwin*, 106 Cal. 486.)

The case of *Jameson v. James, supra*, involved a question as to whether or not the Land Department had jurisdiction to determine whether the land involved in that action was mineral land or agricultural land. The court pointed out in that case that the Land Department had no jurisdiction over land which was not public property of the United States. In that case the court said (p. 278):

> "* * * If the department has jurisdiction, that is, if the land belongs to the United States, and provision has been made by law for its sale, the issuance of a patent is an adjudication that the grantee of the government has performed the acts necessary to entitle him to receive the patent * * *."

THE JURISDICTION OF THE LAND DEPARTMENT.

Petitioners argue that the Land Department is a special, statutory tribunal with power and jurisdiction to fix and establish the boundary line between tideland and upland; that the patent issued to William Banning is conclusive evidence of such boundary line and that it conveyed title to all the land within the exterior boundaries of the me-

ander line of the Norway survey, regardless of whether or not a portion of such area was in fact below the line of mean high tide of the Pacific Ocean and regularly covered and uncovered by the ebb and flow of the tide. The petitioners' contention in this regard is based on the fact that the Land Department is authorized to survey public lands. Conceding that the Land Department has jurisdiction to survey public land, however, it has no jurisdiction to extend such surveys beyond the limit of high water. (Act of February 11, 1805, ch. 14, 2 Stats. 313; R. S. 2396; 43 U. S. C. A. 752.)

Assuming that the Land Department has jurisdiction to establish the boundary line between tideland and upland, it cannot be successfully contended that the Norway survey constituted an exercise of such jurisdiction. The survey was not made for the purpose of fixing and establishing a fixed and permanent line which would constitute a permanent boundary line between tideland and upland. The survey was made for the purpose of determining how much money the applicant William Banning would be required to pay for the land he was seeking to acquire. neither could it be successfully contended that the survey by Norway and the approval thereof by certain officials of the Land Department constituted an adjudication by the Land Department that all the land within the exterior boundary of the meander line, as described by the courses and distances in the field notes of the Norway survey, was upland, particularly when the plat of such survey shows the land as bordering on navigable water and the meander line as described by the courses and distances in the field notes of the Norway survey is below the boundary line as shown on the plat.

Boundary Line Between Tideland and Upland Is a Changing, Shifting Line.

One of the reasons why a meander line run along the border of public land bordering on navigable water does not constitute the boundary line between tideland and upland, and one of the reasons why the Land Department has no jurisdiction to fix and establish a permanent and fixed line, which line as so fixed and established would constitute the permanent boundary line between tideland and upland, is that the boundary line between tideland and upland is subject to such changes as may result from the action of the tide or the flow of the water. It is well settled that where the water line constitutes the boundary, no matter how much the line may shift or change where such shifting and changing is the result of natural causes, the water line continues to be the boundary.

Jefferis v. East Omaha Land Co., 134 U. S. 178;
United States v. Boynton, 53 Fed. (2d) 297;
City of Oakland v. Buteau, 180 Cal. 83;
Bouchard v. Abrahamsen, 160 Cal. 792;
Heckman v. Swett, 99 Cal. 303 at 308.

The Jurisdiction of the Land Department Does Not Extend Beyond the Limits of High Water.

Even if it be conceded that the Land Department attempted to exercise jurisdiction over the land involved in this action—though it is not so conceded—its acts would be a nullity and of no force or effect. The Land Department has only such jurisdiction as has been expressly conferred upon it by Congress—Congress has exclusive con-

trol and jurisdiction over the sale or other disposition of public lands. (Art. IV, Sec. 3, Clause 2, United States Constitution.) Congress has never authorized the Land Department to dispose of tidelands or to extend its survey and grants beyond the limit of high water.

Donnelly v. United States, 228 U. S. 243;

Mann v. Tacoma Land Co., 153 U. S. 273;

Barney v. Keokuk, 94 U. S. 324.

In the case of *Donnelly v. United States, supra,* at pages 261 and 262, the court said:

"'And since this court, in the case of The Genesee Chief, 12 Id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction. there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.* The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated.'

"The doctrine thus enunciated has since been adhered to. Packer v. Bird, 137 U. S. 661, 669; Hardin v. Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U S. 349, 358; Scott v. Lattig, 227 U. S. 229, 243."

Congress could have made grants directly or authorized the Land Department to dispose of tidelands in California prior to the admission of the State of California into the Union, but it never did so. The matter of the disposition of the tidelands was left to the State of California.

Weber v. Harbor Commissioners, 18 Wall. 57;
United States v. Mission Rock Co., 189 U. S. 391;
McGilvra v. Ross, 215 U. S. 70.

In the case of *United States v. Mission Rock Co., supra,* which was an action involving the title to certain tidelands in San Francisco Bay, the court cited with approval and quoted from the case of *Weber v. Harbor Commissioners, supra,* at page 65, wherein the court said:

> "'Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as he might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.'".

Jurisdiction of Land Department Limited to Public Lands.

The Land Department has no jurisdiction over lands which are not public lands of the United States. The jurisdiction of the Land Department is limited and restricted to the sale or other disposition of public lands "Public lands" have been defined to be "such lands belonging to the government as are subject to sale or other disposal under general laws"

Union Pac R. Co. v. Harris, 215 U. S. 386, 54 L. Ed. 246;

Mann v. Tacoma Land Co., 153 U. S. 273, 38 L. Ed. 714;

Bardon v. Northern Pac. R. Co., 145 U. S. 535, 36 L. Ed. 806;

Northern Pac. R. Co. v. Messer-Sauntry Land etc. Mfg. Co., 168 U. S. 604, 42 L. Ed. 596;

Doolan v. Carr, 125 U. S. 618, 31 L. Ed. 844;

Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769;

Northern Lbr. Co. v. O'Brien, 204 U. S. 190, 51 L. Ed. 438.

Tidelands Not Public Lands.

Tideland is not public land within the meaning of the statutes conferring jurisdiction on the Land Department to survey, sell, or otherwise dispose of public land.

Mann v. Tacoma Land Co., 153 U. S. 273,

in which case the court said (p. 284):

> "It is unnecessary, in view of this recent examination of the question, to enter into any discussion respecting the same. *It is settled that the general*

legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the act authorizing the Valentine Scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term 'public lands' does not include tide lands. As said in Newhall v. Sanger, 92 U. S. 761, 763: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' See, also, Leavenworth etc. Railroad v. United States, 92 U. S. 733; Doolan v. Carr, 125 U. S. 618."

Petitioners state (Br. 46) that when California was admitted into the Union it took title to public lands subject to the future exercise of the federal power, including "power to dispose of and make all needful rules and regulations respecting the territory *or other property belonging to the United States.*"

Title to the land involved in this action having passed to the State of California prior to the Norway survey and the patent to Banning, it was not "public land" of the United States at the time of the Norway survey. In the case of *Bardon v. Northern Pacific R. Co.*, 145 U. S. 535, 36 L. Ed. 806, the court said:

"* * * The grant of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of public land. * * *"

When lands cease to be public the jurisdiction of the Land Department over the same ceases.

Tubbs v. Wilhoit, 138 U. S. 134;

Wright v. Roseberry, 121 U. S. 488;

Steel v. St. Louis Smelt. & Ref. Co., 106 U. S. 447;

St. Louis Smelt. & Ref. Co. v. Kemp, 104 U. S. 636

Morton v. Nebraska, 88 U. S. 21 Wall. 660.

The Land Department of the Federal Government Had No Jurisdiction to Patent, Grant or Transfer Title to the Land Involved In This Action.

Even if it be conceded that the meander lines, as described by the courses and distances in the field notes of the Norway survey, were intended as boundaries and that the Land Department intended to and attempted to convey the land involved in this action to Banning, the patent, so far as it attempted to operate as a conveyance of tidelands, would be inoperative and void. A patent may be void in part and valid in part.

Rondell v. Fay, 32 Cal. 354.

After the State of California was admitted into the Union Congress had no power or authority to issue a patent or make a grant of tidelands within said state to any person or corporation whatsoever, and had no authority to authorize the issuance of any such patent or the making of any such grant. This point has been definitely settled by this court in the following decisions:

Pollard's Lessee v. Hagan, 3 How. 212;

Goodtitle v. Kibbe, 9 How. 421;

Mobile Transportation Co. v. Mobile, 187 U. S. 479;

Illinois Central R. R. Co. v. Chicago, 176 U. S. 646;

Water Power Co. v. Water Commissioners, 168 U. S. 349;

Niles v. Cedar Point Club, 175 U. S. 300.

See, also:

United States v. Mackey, 214 Fed. 137;

U. S. v. Chandler-Dunbar Water Power Co., 152 Fed. 25;

Scranton v. Wheeler, 57 Fed. 803;

Cooley v. Golden, 23 S. W. 100, 21 L. R. A. 308;

St. Louis I. M. & S. Ry. Co. v. Ramsey, 13 S. W. 931.

The cases of *Pollard's Lessee v. Hagan, supra*, and *Goodtitle v. Kibbe, supra*, are the leading cases on the question as to whether or not Congress has authority to make grants of tidelands to individuals or corporations after a state is admitted into the Union. The case of *Pollard's Lessee v. Hagan, supra*, was an action in ejectment, and the only question involved in that case was whether or not the land involved in the action was below the line of usual high water mark at the time Alabama was admitted into the Union. The case was tried before a jury and the trial court charged the jury as follows:

> "If they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the Union, then the act of Congress, and the patent in pursuance thereof, could

give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion."

Therefore, the question was squarely presented to this court in that case as to whether or not the court's instructions to the jury correctly stated the law, and in that case the court said:

"This question has been heretofore raised, before this court, in cases from the same state, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided. And we now enter into its examination with a just sense of its great importance to all the states of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the state governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous, well considered decisions of this court, to which we shall have occasion to refer in the course of this investigation."

In the same case, at page 229, the court said:

"'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.'"

Also, at page 230, the court said:

> "* * * The right of the United States to the public lands, and the *power of Congress* to make all needful rules and regulations for the sale and disposition thereof, *conferred no power to grant* to the plaintiffs the land in controversy in this case."

In the case of *Goodtitle v. Kibbe, supra,* the same question was presented to this court for its decision. The facts in that case were practically identical with those in the case at bar. The State of Alabama was admitted into the Union in 1819; the State of California was admitted into the Union in 1850. The plaintiff Goodtitle claimed title by virtue of a patent dated March 15, 1837, which was issued to plaintiff pursuant to an act of Congress; the petitioners herein claim title by virtue of a patent which was issued to William Banning in 1881, thirty-one years after the State of California was admitted into the Union. In the case of *Goodtitle v. Kibbe,* the question presented to this court for its decision was whether or not a patent to land lying below the high water mark after the State of Alabama was admitted into the Union conveyed title to the patentee named therein. In that case the court said (p. 477):

> "The validity of this title was disputed by the defendant, upon the ground that the premises were a part of the shore of the navigable tide-water river lying below high-water mark, when the State of Alabama was admitted into the Union in 1819; and that therefore, at the time of the passage of the act of Congress, the sovereignty and dominion over the place in question were in the State, and not in the United States. And the court instructed the jury, that, if the land described in the plaintiff's declara-

tion was below ordinary high-water mark at the time Alabama was admitted into the Union, the confirming act of Congress and the patent conveyed no title to the patentee.

"The question decided in the State court cannot be regarded as an open one. The same question upon the same act of Congress and patent was brought before this court in the case of Pollard v. Hagan, at January term, 1845, reported in 3 Howard, 212. That case was fully and deliberately considered, as will appear by the report, and the court then decided that the act of Congress and patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the case of Pollard v. Hagan. And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court. But, upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced.

"It has been supposed, in the argument for the plaintiff, that the proceedings in Congress upon the report of the commissioners in relation to the title claimed under the Spanish authorities, which have now been referred to, distinguish this case from that of Pollard v. Hagan. But this Spanish title was acquired in 1809, and it has been repeatedly decided that a Spanish grant in this territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the

soil to the grantee. And this subject was again considered and decided, after careful research and examination, at the present term, in the case of Reynes v. United States, and the former decisions reaffirmed. Undoubtedly, Congress might have granted this land to the patentee, or confirmed this his Spanish grant, before Alabama became a state. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, *nor authorize the general Government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State.*

"The judgment of the Supreme Court of Alabama is therefore affirmed."

A Patent Is Not Conclusive Unless the Land Department Has Jurisdiction to Issue It.

A patent is conclusive only when the Land Department has jurisdiction to act upon the matter which is before it. This honorable court has had occasion to point out that when the Land Department attempts to act on matters over which it has no jurisdiction, its acts are a nullity and void. Instances where patents for land have been issued and have been declared void are as follows:

(1) The lands patented were not at the time public property;

(2) If at the time the lands were patented they had been previously disposed of;

(3) No provision had been made for their sale or other disposition;

(4) The lands patented had been reserved from sale.

This honorable court has on numerous occasions ruled that when a patent has been issued in such cases as above enumerated, the attempted conveyance of such land by patent is inoperative and void, no matter with what seeming regularity the forms of law may have been observed.

Lake Superior etc. Co. v. Cunningham, 155 U. S. 354;

Hardin v. Jordan, 140 U. S. 371;

Wright v. Roseberry, 121 U. S. 488;

Steel v. Smelting Co., 106 U. S. 447;

Smelting Co. v. Kemp, 104 U. S. 636;

See, also:

Ord Land Co. v. Alamitos Land Co., 199 Cal. 380;

Edwards v. Rolley, 96 Cal. 408;

Brown v. Luddy, 121 Cal. App. 494;

People's Water Co. v. Perkins, 34 Cal. App. 513.

In the case of *Wright v. Roseberry, supra* which was an action to recover possession of a tract of land in the County of Yolo, State of California, the court said (p. 518):

> "'It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title.' But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior

conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity. As we said in Smelting Co. v. Kemp, 104 U. S. 636, 641: 'When we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.'

"And again, in the same case, we said, p. 646: 'A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction

to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.'

"'There are cases,' said Chief Justice Marshall, 'in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law.' Polk v. Wendall, 9 Cranch, 87, 99. Indeed it may be said to be common knowledge that patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void. Easton v. Salisbury, 21 How. 426; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112. It would be a most extraordinary doctrine if the holder of a conveyance of land from a state were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, *and especially from showing that years before, they had granted the property to the state, and thus were without title at the time of their subsequent conveyance.* As this court said in New Orleans v. United States, 10 Pet. 662, 731; 'It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee. *A grant has been fre-*

quently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative.'"

It is always permissible to show by extrinsic evidence that a patent is void for want of authority to issue it.

Doolan v. Carr, 125 U. S. 618.

In *Doolan v. Carr, supra,* the court had before it for its determination the question as to whether or not oral testimony was admissible to show a lack of authority in the Land Department for the issuance of the patent which was involved in that action. The court said (p. 624):

> "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, estab-

lished by law and it has been often asserted in this court, that even a *patent from* the government of the *United States,* issued with all the forms of law, *may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.*

"The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. Polk's Lessee v. Wendall, 9 Cranch, 87; New Orleans v. United States, 10 Pet. 662, 730; Wilcox v. Jackson, dem. McConnell, 13 Pet. 498, 509; Stoddard v. Chambers, 2 How. 284, 317; Easton v. Salisbury, 21 How. 426, 428; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112, 117; Leavenworth Railroad v. United States, 92 U. S. 733; Newhall v. Sanger, 92 U. S. 761; Sherman v. Buick, 93 U. S. 209; Smelting Co. v. Kemp, 104 U. S. 636; Steel v. Smelting Co., 106 U. S. 447; Kansas Pacific Railway Co. v. Dunmeyer, 113 U. S. 629, 642; Reynolds v. Iron Silver Mining Co., 116 U. S. 687."

AN APPEAL WITHIN THE LAND DEPARTMENT IS NOT THE ONLY REMEDY WHEN THE LAND DEPARTMENT HAS ACTED IN EXCESS OF ITS JURISDICTION.

The contention of the petitioners that when the Land Department has attempted to convey land over which it has no jurisdiction, or when it has issued a patent to lands which have been previously disposed of or have been reserved from sale or which are not public lands and subject to sale and other disposition by the Land Department, the only remedy is by an appeal within the Land Department, is contrary to the decision of this honorable court in the case of *Hardin v. Jordan, supra.* wherein, at page 400, the court said:

"A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the right of the government to survey and grant the lands under Wolf Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the government. It is contended that by this decision the question became *res judicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of Davis v. Weibold, 139 U. S. 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of*, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had *no jurisdiction to transfer the lands*, and their attempted conveyance by patent is *inoperative and void.*'"

The question as to whether or not the Land Department has acted in excess of its jurisdiction is a judicial question. The question as to whether or not the Land Department had jurisdiction over the land involved in this action depends upon whether the land is or is not tideland. That question may be determined only from the evidence introduced at the trial of the action.

It is well settled that the determination by administrative officers or departments of jurisdictional facts is never binding on the courts. Even if Congress undertook to confer jurisdiction upon the Land Department to conclusively determine jurisdictional facts, its act would be a nullity and void. Congress has no authority to divest the courts of their judicial powers. To confer jurisdiction upon an administrative board or officer to conclusively determine jurisdictional facts, with no power of investigation or review by the courts, would be, as stated by this court in *Crowell v. Benson*, 285 U. S. 22, at p. 59, "to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

The Date Title of the Tidelands Involved in This Case Vested in California is Material.

California was admitted into the Union on September 9, 1850. Upon the admission of the state into the Union it became the owner of all the tidelands within its borders, save and except such lands as had been previously granted to some pueblo or individual by Spanish grant. This is conceded to be the law by the petitioners herein. Therefore, inasmuch as the State of California became the owner of said lands by virtue of its sovereignty, the land involved in this action was "disposed of" so far as the United States government was concerned.

The Land Department has no jurisdiction to transfer land or issue a patent to land which has been previously disposed of.

Hardin v. Jordan, 140 U. S. 371;

Davis v. Weibold, 139 U. S. 507;

Francoeur v. Newhouse, 40 Fed. 618.

The question as to whether or not lands have been previously disposed of is a judicial question to be determined by the court. This question has been definitely settled by this honorable court in the case of *Hardin v. Jordan, supra,* wherein the court said (p. 401):

> "* * * if the lands had been 'previously disposed of,' the department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in Moore v. Robbins, 96 U. S. 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the *courts of justice* present the *only remedy.*'"

The Field Notes and the Plat of the Norway Survey, Which Are Referred to in and Made a Part of the Patent Issued to Banning, Show "Ordinary High Water Mark"—Line of Mean High Tide—As the Boundary Line.

The Norway survey was not made for the purpose of fixing and establishing a permanent boundary line between tideland and upland on Mormon Island. Nor was the meander line, as described by the courses and distances of that survey, intended as the boundary line of the tract of land conveyed to Banning. But even if we concede that the Land Department had jurisdiction to fix and establish a permanent boundary line between tideland and upland on Mormon Island and that the Norway survey was made for that purpose, in construing the patent and survey in accordance with the rules established by the decisions of this honorable court and hereinafter referred to, the water line of the inner bay would constitute the boundary line of the tract of land conveyed to Banning by the patent.

Petitioners contend that the patent is conclusive evidence of the boundary line which is in dispute. Assuming that the patent is conclusive, what line then is shown by and described in the patent as constituting the boundary line of the land described therein. The law is well settled that before a patent concludes anything it must be construed and its meaning determined.

Miller v. Grunsky, 141 Cal. 441,

in which case, at page 449, the court said:

"* * * A patent is no doubt conclusive between the parties and their privies against any col-

lateral attack, but *before it concludes anything it must be construed and its meaning determined,* and when it contains conflicting calls they are to be reconciled upon the same principles and by the same rules that govern the construction of other deeds of conveyance. * * *"

In construing the patent to Banning for the purpose of determining what line constitutes the boundary of the tract of land described therein, consideration must be given to the descriptive clause in the patent, the field notes, and the official plat of the Norway survey. There are certain undisputed facts concerning those matters which are hereinafter referred to.

THE PATENT TO BANNING.

In the year 1881 a patent was issued to William Banning which purported to convey to William Banning all of Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian (R. 660). The land described in the patent to Banning was described in reference to the plat of the Norway survey. The descriptive clause of the patent is as follows, to wit, (R. 660):

"Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands, returned to the General Land Office by the Surveyor General."

THE FIELD NOTES AND THE PLAT OF THE NORWAY SURVEY ARE A PART OF THE PATENT.

When lands are granted according to an official plat of the survey of such lands, the plat itself with all of its notes, lines, descrjptions, and landmarks, becomes as much a part of the grant or deed by which they are conveyed and controls, so far as limits are concerned, as if such descriptive features were written out on the face of the deed or the grant itself.

Jeems Bayou Fishing & Hunting Club v. United States, 260 U. S 561, 67 L. Ed. 402;

Chapman etc. v. St. Francis Levee Dist., 232 U. S. 186, 58 L. Ed. 564;

Jefferis v. East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 872;

Cragin v. Powell, 128 U. S. 691, 32 L. Ed. 566.

The legal effect of the reference in the patent to Banning to the official plat of the Norway survey for identification of the land conveyed, the plat showing the land as bounded on all sides by the water of the inner bay of San Pedro, is a declaration that the waterline is the boundary of the tract conveyed.

Mitchell v. Smale, 140 U. S. 406, 35 L. Ed. 422.

In that case the court said:

"* * * The official plat made from such survey does not show the meandor line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect or a declara-

tion that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

The Field Notes and the Plat of the Norway Survey.

The field notes of the Norway survey call for all the stations of the traverse line of the Norway survey as being located at "ordinary high water mark." The surveyor states (R. 684) that station No. 1 is located at "ordinary high water mark" and "from this point I meander around the island at ordinary high water mark."

The plat of the Norway survey (Book of Exhibits 31) described the traverse line of the survey as "beginning at Meandor Corner 1 at ordinary high water mark; thence along the shore of the Island." The locations of the stations of the survey are then set forth by courses and distances.

The official plat of the Norway survey (Book of Exhibits 31) shows the water line as the boundary line; that is, the plat of the survey shows that the land is bounded on all sides by the water of the inner bay of San Pedro.

We have heretofore pointed out that if the traverse line of the Norway survey was run around the island according to the courses and distances in the field notes, the line would not be coincident with the line of ordinary high water mark—line of mean high tide of the Pacific Ocean.

The locations of the stations of the Norway survey, as described by the courses and distances in the field notes, do not agree with the call in the field notes and the plat for the location of the stations at "ordinary high water mark." Therefore the courses and distances must yield to the call for the location of the stations at "ordinary high water mark," that being a natural object or monument.

It is well settled that in matters of boundaries calls for natural objects and fixed monuments control those for courses and distances.

United States v. State Investment Co., 264 U. S. 206, 68 L. Ed. 639, at 642;

United States v. Lane, 260 U. S. 662, 67 L. Ed. 448;

Higuera v. United States, 5 Wall. 827, 18 L. Ed. 469;

Brown v. Huger, 21 How. 305; 16. L. Ed. 125;

McIver v. Walker, 4 Wheat. 444, 4 L. Ed. 611;

See, also:

Curtis v. Upton, 175 Cal. 322;

Weaver v. Howatt, 171 Cal. 302;

St. Helena v. Merriam, 171 Cal. 135;

Wheatley v. San Pedro, etc., R. Co., 169 Cal. 505;

Orena v. Newlove, 153 Cal. 136;

Miller v. Grunsky, 141 Cal. 441;

Freeman v. Bellegarde, 108 Cal. 179;

Stoll v. Beecher, 94 Cal. 1;

Adair v. White, 85 Cal. 313;

Castro v. Barry, 79 Cal. 443;
Beaudry v. Doyle, 68 Cal. 105;
Spring v. Hewston, 52 Cal. 442;
More v. Massini, 37 Cal. 432;
DeArguello v. Greer, 26 Cal. 615;
Colton v. Seavy, 22 Cal. 496.

In the case of *Higuera v. United States, supra*, the court said:

"* * * But ordinarily, surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Purinton v. Sedgley, 4 Me., 286; Washb. Real Prop. (2d Ed.), 673; Preston's Heirs v. Bowmar, 6 Wheat., 582; Marshall v. Currie, 4 Cranch, 176; Howe v. Bass, 2 Mass., 380; Bosworth v. Sturtevant, 2 Cush. 392; Jackson v. Ives, 9 Cow., 661. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings. Newsom v. Pryor, 7 Wheat., 10; Rix v. Johnson, 5 N. H., 524."

In the case of *Brown v. Huger, supra*, the court said:

"* * * The patent itself could not be altered by evidence *aliunde;* but proof, as to the existence and character of the objects or subjects to which it was applicable, was regular and even necessary to give it effect.

"In ascertaining the boundaries of surveys or patent, the universal rule is this: that wherever natural

or permanent objects are embraced in the calls of either, these have absolute control, and both courses and distances must yield to their influence."

In the case of *McIver v. Walker, supra,* the court said:

"* * * All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently, if marked trees and marked corners be found, conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable, and more frequent, than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated, and accurately described. * * *"

The identical point was involved in the case of *Curtis v. Upton, supra,* which is involved in the case at bar. That case involved the survey of lands bordering on the Pacific Ocean, and one of the questions involved in that case was whether or not the natural monument referred to in the field notes of the survey as the "high tide line" should control over the courses and distances set forth in the field notes. In that case the starting point of the survey was described as on "its high tide line" 35 chains from one end, 16.36 chains from the other, and this point was 28½ degrees west 30 links from the southerly corner of the Bolinas Ranch. The question involved in that case was whether the starting point of the survey should be 30 links from the southern corner of the Bolinas

Ranch or whether the high tide line of the Pacific Ocean, wherever that line may be, should be considered the starting point of the survey, and in that case the court decided that the distance, 30 links, must yield to the calls for the tide line. In that case the court said (p. 333):

> "* * * In determining the position of a tract of land from a description or survey, natural objects referred to as bounds prevail over the measurement of lines and angles. (Code Civ. Proc., sec. 2077.) The *distance, 30 links, must yield* to the calls for the *tide lines.* * * *"

The case of *Adair v. White, supra,* is a case squarely in point with the case at bar. The question in that case was the correct location of the southerly boundary of the rancho Santa Paula to which a patent had been issued on a confirmed Mexican grant. The southerly boundary of the rancho Santa Paula was described in the field notes of the survey as beginning at a station marked S. P. 13 and thence by a line described by courses and distances to a station marked S. P. 14. Station S. P. 14 was described as the most southerly point of the Lomas de Santa Paula hills, known as the Punta de la Loma. The field notes described the distance between stations S. P. 13 and S. P. 14 as being 492 chains in length. The action was one to quiet title and it was claimed that the land in dispute was included in the patent which had been issued to the rancho Santa Paula. That claim was based on the contention that by following the courses and distances as set forth in the field notes of the survey station S. P. 14 of that survey would be at some point other than the point referred to as Punta de la Loma. In that case the court said (p. 316):

"It will be observed that this line terminates at the most southern point of the hills called the Lomas de Santa Paula, which point is known as the Punta de la Loma. This is a natural object or monument, and the station S. P. 14 was there fixed and established by the calls of the patent.

"If this point can be found, it is only necessary to run a line from S. P. 13 to S. P. 14 to fix the southern boundary line. It may be that the length of this line, as stated in the field-notes, is not accurate. It is stated in the notes to be 492 chains in length. If it should turn out to be actually longer or shorter than 492 chains, this is immaterial in fixing the line. The line must, according to the calls of the patent, run to this point, whatever be its length,—whether the line exceed in length 492 chains, or be less than 492 chains. The same may be said of the course. Any variation in the course should be disregarded. The variation, if any, as the testimony shows, can only be trifling; whether varying in any wise, or not, that course must be pursued which will bring the line to the natural object, the Punta de Loma. The above is in accord with the well-settled rule that in applying a conveyance to the tract of land described in it, course and distance must yield to natural objects or monuments called for. Such monuments are more certain and less liable to mistake or error than course and distance, and therefore monuments, as more certain prevail over course and distance, partaking more or less of uncertainty."

The case of *More v. Massini, supra,* is likewise a case squarely in point with the case at bar. The question involved in that case, as stated by the court (p. 435) was "whether the lands in controversy—that is to say, the lands below the line of ordinary high tide of the Pacific

Ocean—are embraced within the patent." That action also involved the question of the title to certain lands which it was claimed were embraced within the exterior boundary lines of the lands described in the patent. In that survey some of the stations were mentioned as being at the seashore, but between the stations the survey made no reference to any visible object or monument, either natural or artificial. It will be noted that in that case, like in the case at bar, if the meander lines as described by the courses and distances should control, portions of the sea would have been included within the lines of the property described in the patent. In that case the court said (pp. 436-437):

> "* * * It appears by the plat that, following the courses and distances of the survey, portions of the sea will be included in the lines of the rancho. This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the sea shore. It is a general rule in the construction of grants and deeds of conveyances, containing descriptions of the premises, one part of which is inconsistent with or repugnant to another, that visible local objects or monuments mentioned in the conveyance will control both courses and distances. The survey mentions the sea shore as the termination of the fourth course, and the twelfth course commences at the sea shore, but at the intermediate stations no visible object, nor any monument, either natural or artificial, is mentioned. The call for the sea shore as the southern boundary must be regarded as the more definite and certain, 'and will prevail over a call for a mere station,' and over the courses and distances."

In the case at bar the calls in the field notes refer to fourteen stations, each of which is located, according to

the field notes, at high water mark—a natural monument. In the field notes station 1 is located at "ordinary high water mark" and from that point the surveyor states that he meandered around the island at "ordinary high water mark."

The decision of the court in the *More* case, *supra*, is a complete answer to petitioners' contention that meander corners of a government survey may not be disturbed in an action to determine the question as to what line constitutes the true boundary line between tideland and upland. It will be noted that the court in the *More* case stated that

> "the call for the sea shore as the southern boundary must be regarded as the more definite and certain *'and will prevail over a call for a mere station'* and over the courses and distances."

In the case of *DeArguello v. Greer, supra*, the court, in speaking in reference to the reason for the rule that in the matter of boundaries natural objects or monuments called for as the boundary of a survey control calls for courses and distances, said (pp. 630-631):

> "The rule is well settled that where land is described in a deed by permanent objects as its boundaries, and also by courses and distances with a mention of the quantity, the description by courses, distances and quantity must yield to the boundaries if they do not agree. (Stanley v. Green, 12 Cal. 164, and the cases there cited; 17 Mass. 207; 17 Pick. 357; 19 Pick. 445.) This rule rests upon solid reasons. While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land, or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments."

A PATENT ISSUED TO PUBLIC LAND BORDERING UPON NAVIGABLE TIDE WATER CONVEYS TITLE UP TO THE WATER LINE ONLY.

The only portion of the island which was subject to sale or other disposition by the Land Department was such land as was above the line of mean high tide. All land below that line was tideland, title to which was vested in the State of California. It could not be successfully argued that the government intended to or could convey land which it did not own and which was not "public land of the United States" and subject to sale or other disposition by the Land Department.

Patents are to be strictly construed against the grantee. Such public grants convey nothing by implication but are construed strictly in favor of the government, and unless the necessary and unavoidable construction of the patent shows a plain intent to convey the land in question it will not be so construed.

Shively v. Bowlby, 152 U. S. 1, 10.

Grants by Congress of portions of public lands, though bordering on or bounded by navigable water, convey of their own force title only to the upland or what lies above ordinary high water mark.

McGilvra v. Ross, 215 U. S. 70;
Morris v. United States, 174 U. S. 196, 237;
Eldridge v Trezevant, 160 U. S. 452;
Shively v. Bowlby, 152 U. S. 1;
Hardin v. Jordan, 140 U. S. 371.

In the case of *McGilvra v. Ross, supra*, at pages 78-80, the court said:

"It was observed that the United States, while it held the country as a Territory, having all the powers of national and of municipal government, might have granted for appropriate purposes rights and titles below high-water mark. See United States v. Winans, 198 U. S. 371; Prosser v. Northern Pacific R. R., 152 U. S. 59. But, it was said, that they had never done so by general laws, but had considered it 'as most in accordance with the interest of the people and with the object for which the Territories were acquired of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states respectively, when organized and admitted into the Union.' This policy, it was remarked, as 'to navigable waters and the soils under them, whether within or *above* the ebb and flow of the tide,' has been 'constantly acted upon.' And hence it was further said: 'Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States.' The conclusion necessarily follows, as expressed by the court, that the state may dispose of its lands under navigable waters 'free from any easement of the upland proprietor.'

"Joy v. St. Louis, 201 U. S. 332, is to the same effect. See, also: Scranton v. Wheeler, 179 U. S. 141, 190; United States v. Mission Rock Co., 189 U. S. 391; Kansas v. Colorado, 206 U. S. 46-93. * * *"

In the case of *Hardin v. Jordan, supra,* the court said (p. 381):

> "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Weber v. Harbor Commissioners, 18 Wall. 57. * * *"

The Claim of Petitioners That "the Court Erred in Holding That the Mean High Tide Line Is the Boundary Between Upland and Tideland."

The petitioners contend that the boundary line between tideland and upland in California is high-water mark, a visible mark on the ground made as a result of the action of the water, and in the event it is not such mark then it is the mean of the neap tides.

The question as to what line constitutes the boundary line between tideland and upland will be determined according to the law of the state in which the land is situated.

Hardin v. Shedd, 190 U. S. 508, 47 L. Ed. 1156;

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331;

Kaukauna Water Power Co. v. Green Bay etc. Canal Co., 142 U. S. 254, 35 L. Ed. 1004;

Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 974;

City of St. Louis v. Rutz, 138 U. S. 226, 34. L. Ed. 941;

Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819;

Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224.

THE CALIFORNIA COURTS HAVE DETERMINED THE "LINE OF MEAN HIGH TIDE" TO BE THE BOUNDARY LINE BETWEEN TIDELAND AND UPLAND.

The courts of California, in the cases of *Miller & Lux Inc. v. Secara,* 193 Cal. 755, and *Los Angeles v. San Pedro etc. R. R. Co.,* 182 Cal. 652 (*Certiorari* denied, 254 U. S. 636), and *City of Los Angeles v. Duncan,* 130 Cal. App. 11, definitely determined that the "line of mean high tide" is the boundary line between tideland and upland in California. The question as to what line constitutes the boundary line between tideland and upland in California was forever put at rest by the decision of the Supreme Court in the *San Pedro etc. R. R. Co.* case. That case was an action to quiet title to a small parcel of tideland which lies directly across the channel from Mormon Island and abuts on the inner bay of San Pedro. The question involved in that case was whether the inner bay exception line, being a meander line of a government survey, constituted the boundary line between tideland and upland, or whether the line of mean high tide of the Pacific Ocean was the actual boundary line. Therefore, the identical question in the case at bar was presented to the Supreme Court in the *San Pedro R. R.* case, and in that case the court held that the line of mean high tide was the boundary line, and at page 658 of its decision, said:

"Had the description ended with the word 'San Pedro' in the following phrase, 'Excepting, reserving and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro,' the title to the tidelands of the bay would unquestionably be in the plaintiff, for the reason that it is thoroughly established that the term 'navigable waters' include all waters below the *high-tide line,* and the phrase thus used is equivalent to the statement 'that portion thereof covered by the water of the inner bay of San Pedro at *mean high tide.*' * * *"

Again, at page 663, the court said:

"* * * In legal contemplation, the bay may always be said to extend to the *mean high-tide level*; as a matter of fact the actual water line is constantly changing, and perhaps the mean high tide level, as now so definitely and accurately determined, may have been unknown in 1858 when the survey for the patent was made."

Petitioners argue that the decision of the Supreme Court of the State of California in the *San Pedro R. R.* case—that the boundary line betweeen tideland and upland in California is the line of mean high tide—is not controlling. Petitioners make the bold assertion that the court did not decide that the line of mean high tide constituted the boundary line. The only question involved in that action was what line constituted the boundary line between tideland and upland and, as we have hereinabove pointed out, the court held that the line of mean high tide of the Pacific Ocean, and not the meander line of the government survey, was the boundary line. The point which the Supreme Court of the State of California

did not decide in the *San Pedro R. R.* case was whether the line of mean high tide was 5.1 feet above the datum plane of mean lower low water or whether it was at some other elevation. This point was not decided for the reason pointed out by the Circuit Court in its opinion in the case at bar—it was agreed by all parties to that action that the line of mean high tide was 5.1 feet above the datum plane of mean lower low water. The Circuit Court in its opinion in the case at bar referred to the agreement of the parties in the *San Pedro R. R.* case and stated as follows (R. 724):

> "* * * that this line 5.1 feet above mean low tide was agreed upon by the parties and upon that basis assumed by the court to be the boundary line between the tide lands and the upland. * * *"

The question involved in the case of *City of Los Angeles v. Duncan, supra,* was the same as that involved in the *San Pedro R. R. Co.* case and in the case at bar. In that case the court said (p. 14):

> "* * * The map itself, together with its maker's explanation, shows that the sinuous line was intended as a meander approximately locating the line of mean high tide. *Therefore the line of mean high tide,* as it actually existed on the ground, rather than this meander line, *constituted the real boundary.* (Curtis v. Upton, 175 Cal. 322 (165 Pac. 935); Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652 (189 Pac. 449).)"

In the *Miller & Lux* case the court held that the line of mean high tide was the boundary line between tideland and upland and stated that the "plane of ordinary high tide" is the average of the "high tides". The court,

in the *Miller & Lux* case, referred to the method used by the court in the *San Pedro R. R.* case in locating the line of mean high tide on the ground and using that line as the boundary line between tideland and upland, and at page 761 said:

> "* * * The method of locating the line of *high tide* by ascertaining the intersecting line of the plane of water at *mean high tide* with the surface of the land, and using this line of intersection as the *boundary line* between the tidelands of the city and the adjoining lands of the defendants was used in the case of City of Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652 (189 Pac. 449), * * *."

The court, in the *Miller & Lux* case, not only held that the "line of mean high tide" was the boundary line between tideland and upland, but stated that the method used by the court in the *San Pedro R. R.* case was the only method which could be used in locating the boundary as fixed by the statute, to-wit, Sec. 830 of the Civil Code of the State of California. The court said (pp. 761-762):

> "* * * Indeed, this is the *only possible method* of locating the boundary line fixed by statute (sec. 830, Civ. Code) as the *boundary of lands bordering on tide water*. The plane of ordinary high tide is an imaginary plane fixed by observation and calculation as to the average high tide and its location is fixed by running of this level on the shore. * * *"

The boundary line as described by the Supreme Court of the State of California in the *San Pedro R. R.* case, and so specifically defined in the *Miller & Lux* case, is the line respondent contends is the boundary line between tideland and upland on Mormon Island.

The decision of the Supreme Court of the State of California in the *Miller & Lux* case is a complete answer to the contention of the petitioners that the expression "ordinary high water mark", as used in sections 670 and 830 of the Civil Code of the State of California, as amended in the year 1874, means a visible mark made on the ground by the action of the water, and that if it does not mean a visible mark on the land then it should be construed as meaning the mean of the neap tides.

OTHER CALIFORNIA CASES ON BOUNDARY LINE.

In *De Watson v. San Pedro etc. R. R. Co.*, 169 Cal. 520, 521, the court described the boundary line between tideland and upland bordering on the waters of San Pedro bay as "the actual high *tide line* of the bay".

In *People v. California Fish Co.*, 166 Cal. 576, the court defined "tidelands" as including "the entire sea beach from the Oregon line to Mexico, and the shores of every bay, inlet, estuary, and navigable stream *as far up as tide water goes and until it meets the lands made swamp by the overflow and seepage of fresh water streams.*"

In *Pacific etc. Co. v. Packers Assn.*, 138 Cal. 632, the court defined "tidelands" as "that portion of the shore, or beach, covered and uncovered by the ebb and flow of an *ordinary* tide."

In *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, the court defined "tidelands" as "those lands only which are covered and uncovered by the daily flux and reflux of the tides".

In *Land and Water Co. v. Richardson*, 70 Cal. 206, the court described the boundary line between tideland and

upland as "ordinary high-water mark", and also stated that the land lying "between high and low water mark was the property of the state".

In *Wright v. Seymour*, 69 Cal. 122, the court, in describing the tideland which belonged to the state, described it as land lying "below common but not extraordinary high-water mark".

In *Rondell v. Fay*, 32 Cal. 354, 364, the court defined "tidelands" as "lands covered and uncovered by the ordinary tides".

In *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, the court defined the word "shore" as "the space between high and low water mark".

In *People v. Davidson*, 30 Cal. 379, 386, the court defined "tidelands" as "lands which are covered and uncovered by the tide".

The terms "ordinary high-water mark", "line of mean high tide", and "high tide line", are synonymous terms. This is evident from the above and foregoing authorities wherein these terms are frequently used and are used interchangably.

California Legislature Recognizes Mean High Tide as the Boundary Line.

The State of California recognizes the boundary line between tideland and upland as being the line of mean high tide. The descriptive clause in the act of the Legislature of the State of California (Stats. 1911, p. 1256) granting the tidelands to the respondent herein, is as follows:

"Section 1. There is hereby granted to the city of Los Angeles, a municipal corporation of the State

of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated *below the line of mean high tide* of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions, following, to-wit: * * *."

Decisions of Other Courts Defining Boundary Line Between Tideland and Upland.

For additional authorities in support of respondent's contention that the boundary line between tideland and upland is the line of mean high tide, we submit the following:

Attorney General v. Chambers, 4 De G. M. & G. 206;

East Boston Co. v. Commonwealth, 203 Mass. 68, 89 N. E. 236, 17 Ann. Cas. 146;

New Jersey Zinc etc. Co. v. Morris Canal etc. Co., 44 N. J. Eq. 398, 15 Atl. 227;

State v. Pickney, 22 S. C. 484.

In the case of *East Boston Co. v. Commonwealth, supra*, the court had before it for its consideration the question as to what level was intended by the expression "ordinary low water mark", and in that case the court said:

"On the question what level is meant by the 'ordinary low water mark,' a great many considerations both of law and of fact were presented to the master, and were before the judge of the Land Court.

"The quoted words suggest at once a distinction between the line indicated and absolute low water mark, or extreme low water mark. The language is 'ordinary' low water mark, which seems to imply that there is some recognized line to which the tide usually ebbs. But the evidence shows that this is not the fact. The line of low water, like the line of high water, is gradually and constantly changing from day to day in different parts of the month, and in different parts of the year, from the highest spring tides to the lowest neap tides. If the distinction intended is between the extreme low water mark and the ordinary or common line of low water, having reference to all times and all seasons, *the only way of reaching a correct result is to take the average of the low tides, which gives us the line of mean low water.* The use of the word 'ordinary' distinguishes this grant from the colonial ordinance of 1647, which extends the line of individual ownership as far as the tide ebbs, if that point is not more than one hundred rods from ordinary high water mark. For reasons stated in the decisions, this means the line of extreme low water shown at an ebb of the tide, resulting from the usual causes and conditions. Wonson v. Wonson, 14 Allen (Mass.) 71, 82.

* * * * * * * *

"Upon the facts found, the judge made no error of law in holding that 'the ordinary lowe water marke' meant in 1640 the same as the line of 'mean low water', as these words are now used, and that an allowance of the seventy-nine one hundredths of a foot below the mean low water mark for the present day, for the subsidence of the land since 1830, gives, as nearly as it can be ascertained, the ordinary low water mark of 1640. * * *"

"Ordinary low water mark" being the mean of all low tides, by the same token "ordinary high water mark" should be the mean of all high tides.

In the *New Jersey Zinc Co.* case, *supra*, the court said:

> "A person acquiring title to land abutting on a navigable stream takes title only to the high water line, and that line is limited by the outflow of the medium high tide between the spring and neap tides."

And in *State v. Pickney, supra;* the court said:

> "A conveyance which calls for, as boundaries, navigable streams in which the tides ebb and flow, carries the title of the grantee to the line reached by the water at ordinary or daily high tide as distinct from high spring tides or ordinary spring tides. This rule is distinctly described and established in the case of United States v. Pacheco, 2 Wall. 590."

TIDES REFERRED TO BY CALIFORNIA COURTS AS "ORDINARY OR NEAP TIDES" ARE NOT THE SAME AS THOSE DEFINED BY U. S. COAST AND GEODETIC SURVEY AS NEAP TIDES.

Petitioners contend that if the boundary line between tideland and upland is not high water mark, then it is the mean of the neap tides. By the use of the term "neap tides" the petitioners mean or refer to the lowest high tides of the month as defined by the U. S. Coast and Geodetic Survey. In support of their contention that the mean of the neap tides constitutes the boundary line between tideland and upland, petitioners cite the cases of *Ward v. Mulford,* 32 Cal. 365; *People v. Morrill,* 26 Cal. 336; *F. A. Hihn Co. v. City of Santa Cruz,* 170 Cal. 436; *Eichelberger v. Mills Land etc. Co.,* 9 Cal. App. 628; *Forgeus v. County of Santa Cruz,* 24 Cal. App. 193; *Oak-*

land v. E. K. Wood Lumber Co., 211 Cal. 16; and *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, wherein the courts refer to the boundary line between tideland and upland as being the limit reached by the "ordinary or neap tides".

It is apparent that the boundary line between tideland and upland referred to in those cases as the "limit reached by the ordinary or neap tides" would not be coincident with the mean of the neap tides, as "neap tides" are defined by the U. S. Coast and Geodetic Survey.

Neap tides are the lowest high tides of the month. They occur when the moon is in its first and third quarters. The U. S. Coast and Geodetic Survey has defined "neap tides" and "spring tides" as follows:

> "When the moon is in its first and third quarters the tidal forces of the sun and moon are opposed and the tide does not rise as high nor fall as low as *on the average*. At such times the tides are called 'neap tides', and the range of the tide then is known as the 'neap range'."
>
> "At times of new moon and full moon the tidal forces of moon and sun are acting in the same direction. High water then rises higher and low water falls lower than usual, so that the range of the tide at such times is greater than the average. The tides at such times are called 'spring tides,' and the range of the tide is then known as the 'spring range'."
>
> See, Special Bulletin No. 135 entitled, *Tidal Datum Planes*, issued by U. S. Coast and Geodetic Survey.

The court, in the cases cited and relied upon by petitioners in support of their contention that the mean of the neap tides is the boundary line between tideland and up-

land, did not intend by the expression "ordinary or neap tides" to mean the average height of the lowest high tides of the month as urged by the petitioners.

The land involved in the case of *Hihn Co. v. City of Santa Cruz, supra,* cited and relied upon by petitioners in support of their contention that the mean of the neap tides is the boundary line between tideland and upland, was above the line of ordinary high tide and below that of extraordinary high tide. In that case the court said (p. 442):

> "* * * The tidelands are those below the line of 'ordinary high tide.' (People v. Morrill, 26 Cal. 336, 353; Teschemacher v. Thompson, 18 Cal. 21, (79 Am. Dec. 151); Wright v. Seymour, 69 Cal. 125 (10 Pac. 323).) The 'high-water mark, which defines the limit of the state's sovereignty, is the usual or ordinary high-water mark. By that designation we mean the limit reached by the neap tides—that is, those tides which happen *between* the full and change of the moon twice in every twenty-four hours.' (Teschemacher v. Thompson, 18 Cal. 21, (79 Am. Dec. 151).) The land between this ordinary high-water mark and the limit of unusual or extraordinary tides is not under our law included within the tidelands thus passing to the state, but such lands remained vested in the United States as a part of the uplands.".

And at page 443 the court said:

> "* * * As we have already said, the lands held by a state in its sovereign capacity in trust for the public uses of navigation and fishery are 'the lands lying between the lines of ordinary high and low tide as well as that within a bay or harbor and permanently covered by its water.' (People v. California Fish Co., 166 Cal. 576, 584, * * *).)"

In the case of *Eichelberger v. Mills Land etc. Co., supra,* the court referred to neap or ordinary tides as constituting the boundary line between tideland and upland, but defined neap tides as being "ordinary tides and which happen *at* the change and full of the moon twice in twenty-four hours". In that case the court said (pp. 639-640):

> "'* * * The neap, or ordinary tides, which happen *at* the change and full of the moon, twice in twenty-four hours.' (Angell on Tide Waters, p. 68; Teschemacher v. Thompson, 18 Cal. 11, (79 Am. Dec. 151).) Tide lands are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides (Ward v. Mulford, 32 Cal. 365; People v. Morrill, 26 Cal. 336, 354), and constitute the seashore (Storrer v. Freeman, 6 Mass. 435, (4 Am. Dec. 155)), over which the state exercises control and ownership by virtue of its sovereignty. (Hall on Rights of the Sea.) The land extending to the line indicated by high-water mark at ordinary or neap tide is the subject of private ownership.
>
> The line to which the flow of the water reaches at ordinary or neap tide, unaffected by wind or wave, not the line of extreme high tide nor extreme reach of the wash of the waves, constitutes the boundary line between the tract of land in question and the Pacific Ocean. * * *"

In *Forgeus v. County of Santa Cruz, supra,* the court defined neap tides as being the tides which happen "between the full and change of the moon twice in twenty-four hours". (p. 195.)

In the case of *Oakland v. E. K. Wood Lumber Co., supra,* the court referred to the "high tide line" as being the boundary line and also referred to that line as being

the limit reached by the "neap or ordinary tides". In that case the court said (pp. 22-23):

> "It is recognized that the owner of land riparian to a navigable body of water has no right below the *high-tide line* as against the state, the property in and dominion and sovereignty over the soils 'covered and uncovered by the flow and ebb of the neap or ordinary tides' having been reserved to the states subject to the rights granted to the United States by the Constitution (Shively v. Bowlby, 152 U. S. 1 (38 L. Ed. 331, 14 Sup. Ct. Rep. 548)), and on the same equality to California (Weber v. Harbor Commrs., 85 U. S. 57 (21 L. Ed. 798)), which holds the title in trust for the benefit of the people for purposes of navigation and fishing (Ward v. Mulford, 32 Cal. 365, 372). * * *"

In the case of *Otey v. Carmel Sanitary Dist., supra,* the court referred to "neap tides" as being "twice a day tides".

It will be noted that in none of the cases cited and relied upon by petitioners do the courts refer to the mean of the neap tides as constituting the boundary line. In some cases cited and relied upon by petitioners the courts define "neap tides" as "neap or ordinary tides which happen *at* the change and full of the moon twice in twenty-four hours". Other cases define "neap tides" as "those which occur *between* the full and change of the moon twice in twenty-four hours".

As pointed out by the Circuit Court in its opinion in this case, and also by the court in the *East Boston Co.* case, *supra,* the line reached by the tides is constantly changing from day to day at different periods of the month and also different periods of the year, and, therefore, the

limit reached by the "ordinary or neap" tides which occur twice in every twenty-four hours would not and could not fix and establish any definite boundary.

The courts, in the cases cited by petitioners, point out that the boundary line is not the limit reached by the "unusual" or "extraordinary" high tides. Why then should it be fixed as the limit reached by unusual or extraordinary low high tides? The respondent is not contending in this action that the boundary line between tideland and upland is the limit reached by the unusual or extraordinary high tides. Neither is it contending that the boundary line is the mean of the higher high tides.

It will be noticed that in all of the cases above referred to the courts referred to "neap tides" as "ordinary tides". Neap tides being tides which do not rise as high nor fall as low as the average tides during the month, they could not be considered "ordinary" tides. The courts used the term "neap tides" as synonymous with the term "ordinary tides". The term "ordinary tides" could refer to none other than those tides which occur most frequently during the month.

The Circuit Court in its opinion in the case at bar (R. 726) pointed out that the statement of Judge Field in the case of *Teschemacher v. Thompson*, 18 Cal. 11, that "the boundary line is the limit reached by the neap tides", which statement has been quoted by the courts of California in the cases cited by petitioners in their brief, was dictum.

If it should be determined that the mean of the neap tides, as that term is defined by the U. S. Coast and Geodetic Survey, constitutes the boundary line between

tideland and upland, a large portion of the land which has been defined by this court as tideland in *Mann v. Tacoma Land Co.*, 153 U. S. 273, 38 L. Ed. 714, and *Baer v. Moran Bros.*, 153 U. S. 287, 38 L. Ed. 718, would be placed in the class of upland. In the case of *Baer v. Moran, supra,* the court defined "tideland" as being land "uncovered at ordinary low tide and was covered with water at ordinary high tide", and also stated that land

> "* * * thus alternately covered and uncovered and between the dry upland and the navigable water is land which may be used in facilitating approach to the navigable waters from the upland, and is strictly within the description of 'tideland', and covered by the rule in respect to such lands."

ELEVATION OF MEAN HIGH TIDE IS 5.1 FEET.

The elevation of the line of mean high tide above the datum plane of mean lower low water is 5.1 feet. The petitioners contend that it is 4.7 feet. The elevation of mean high tide of 4.7, as determined by the U. S. Coast and Geodetic Survey, does not include the "seiche" which is a meterological condition which is prevalent in the bay of San Pedro and is independent of the astronomical influence [R. 402]. The evidence shows that the actual average height of the high tides including the seiche is 5.1 [R. 418, 440, 476, 533, 577, 608]. [Hughes, R. 334; Leypoldt, R. 398-408.]

The harbor line map (Respondent's Ex. 12; Book of Exhibits 14) contains the statement which is certified to by the United States engineers that the "average rise of tides above the plane of reference is 5-1/10 feet". It is so well known to and so generally understood by, those

familiar with the tides in the inner bay of San Pedro that the mean high tide is 5.1 feet above datum that the parties to the *San Pedro R. R.* case stipulated that 5.1 feet was the correct elevation.

The trial court did not determine the elevation of the line of mean high tide. The trial court held that the elevation of that line was wholly immaterial. As pointed out by the Circuit Court in its opinion, the elevation of the line of mean high tide is a question to be determined by the trial court upon the retrial of the action, and the court should determine where that line intersects the surface of the island, that line being the boundary line between tideland and upland all land below that line being tideland and the property of the respondent.

The Complaint States a Cause of Action.

Petitioners contend (Brief 98) that reference in the complaint to the "line of mean high tide" as the boundary line between tideland and upland renders the description of the land involved in this action defective and that therefore the complaint does not state a cause of action.

The grant from the state described the land as all tideland and submerged land lying below the "line of mean high tide". The courts have determined that the line of mean high tide is the boundary line between tideland and upland in California. The land involved in this action is, however, specifically described by metes and bounds in paragraph XII of the complaint [R. 9, 10, 11].

The starting point of the description is certain. It is easy enough to find that point. The line then proceeds by courses and distances which are definite and certain, and

the land could be easily located by any surveyor or officer who undertook to locate the same from the description contained in the complaint.

Section 455 of the Code of Civil Procedure of the state of California is as follows, to wit:

> "Sec. 455. *Description of real property in a pleading.* In an action for the recovery of real property it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it."

The description of real property set forth in the complaint in the case of *Merryman v. Kirby,* 13 Cal. App. 344, at page 347, as

> "* * * That portion of said lot number four of said section (section 31 in township 8 N., R. 1 E., H. B. & M.) described as follows, to wit: Commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where said line would intersect the westerly line of said lot four; thence southerly along the westerly line of said lot four to the southwest corner of said lot four, thence east to the place of beginning.'"

was held to comply with the code section hereinabove referred to.

The description of real property set forth in the complaint in the case of *Hihn v. Mangenberg,* 89 Cal. 268, at page 270, as

> "* * * being in Soquel township, Santa Cruz county, state of California, and bounded on the northeast by Bay avenue, on the southeast by the land of M. E.

Land, and on the southwest and northwest by Soquel Creek",

was held to comply with the code section hereinabove referred to. See, also, *Muir v. Meredith,* 82 Cal. 19.

We submit that the contention of petitioners that the complaint does not state a cause of action is without merit.

The Claim of Petitioners That the Circuit Court Erred in Granting a New Trial Without an Examination of the Sufficiency of the Proof Offered by Respondent in Support of the Allegations of the Complaint.

Petitioners assert that the Circuit Court did not examine the sufficiency of the evidence introduced by respondent for the purpose of determining whether or not it was sufficient to support the allegations in the complaint. There is nothing in the record to indicate that the Circuit Court did not examine the evidence in the case, but, on the contrary, the opinion very clearly indicates that the court did examine the proof offered by respondent and after such examination ordered a new trial.

The undisputed and uncontradicted evidence shows that the land involved in this action is tideland. The findings of the trial court that the land involved in this action was not tideland was not based upon any lack of proof on the part of the respondent. The trial court ruled that it was immaterial what the proof showed as to the location of the shore line of Mormon Island or ordinary high water mark, i. e., line of mean high tide of the Pacific Ocean, and that it was also immaterial what the proof showed as to the character of the land involved in this action. The

trial court ruled that the fact that the land involved in this action was regularly covered and uncovered by the ebb and flow of the tide was wholly material, and that the plat showed the land as bordering on navigable water was also immaterial.

The findings and decision of the trial court were based solely upon the erroneous conclusion of law that the meander line, as described by courses and distances in the field notes of the Norway survey, was the boundary line of the tract of land described in the patent to Banning and that the approval of such survey by officials of the Land Department constituted a conclusive adjudication by that department that all the land within the exterior boundaries of that line was upland. In this connection we quote the record [633-635]:

> "'Mr. Ashburn: At this time, if Your Honor please, we move the court for an order of dismissal of the plaintiff's case, or upon the plaintiff's complaint, upon the ground that the plaintiff has wholly failed to produce evidence proving or tending substantially to prove any of the controverted allegations of the complaint, and specifically that it has failed to prove or produce evidence tending to prove that the disputed area was, at the time of the Norway survey, or in fact any other time, tide land. Of course, we are still insisting upon the proposition that inasmuch as the Norway survey is conclusive, and your Honor has heard this evidence that has been received to date only as bearing upon what might or might not have been the condition at the time of the Norway survey, that there is double reason for the granting of the motion, first, the legal proposition as to the effect of the Norway survey, and secondly, that the evidence received is so remote, indirect and inaccurate, and of

such slight evidentiary value as not to rise to a substantial amount of evidence throwing light upon the conditions prevailing at the time of the Norway survey.'

Whereupon the court made the following observation, ruling or order:

"'The Court: No, I think under the ordinary nonsuit rule, on that ground the motion would not lie. In other words, regardless of what the court might believe to be the evidence or preponderance of the evidence, nevertheless, all favorable inferences are adopted, and all unfavorable ones rejected, to require a dismissal. So, as far as that point is concerned, I don't care for any argument. I am very considerably concerned, however, over the original question which was presented here, the effect of the patent. Now, where do we stand with respect to it. In other words, when the ruling was made, you proceeded to the evidence, of course, on the part of the plaintiff. Now, does that make any difference in the situation with respect to the effect of the patent? The question is a federal question and not a state question. The Supreme Court would not be an authority on this question, because, uniformly throughout the United States Supreme Court decisions a question of this kind is strictly a federal question.

* * * * * * * *

However, I have come to a definite conclusion that the patent is superior and its authority is not open to collateral attack. I have come to that conclusion for the reasons that taking the language of Corpus Juris—a very clear statement is made in Corpus Juris to the effect that to the Land Department is given the duty of determining the character of the land. Now, obviously, in this case the Land Department was within its rights in finding that a

certain portion of the land is open, is government land; they had power to do that. Now, how is a limit going to be placed upon that? How is it possible, because it is a very familiar rule that where there is a tribunal that has jurisdiction to determine a question it has jurisdiction to determine it wrong. It does not militate against the jurisdiction that it does not determine it correctly. That is a very familiar principle of law wherever this matter is involved. In land proceedings—and I am assuming that there is no dispute here that the patent is properly set forth; in other words, admitted by both sides—that was stated to begin with—

"Mr. Ashburn: Yes, sir.

"The Court: Now, I confess there might be some question of just how the matter is to be gotten at, but I am forced to this conclusion, because it is clearly and definitely decided in the United States Supreme Court decisions that the finding of the Land Department as to the character of the land prevails against proof that it is swamp and overflow land, for instance. The authorities are uniform, and a number of them quoted on that."

The memorandum opinion of the trial court [R. 161] shows that the erroneous conclusion of law hereinabove referred to was the basis of the findings and decision of the trial court.

The ruling of the trial court was, in effect, a ruling that the land involved in this action was in fact tideland but as a matter of law it was upland. In the memorandum opinion the court said [R. 161]:

"The plaintiff introduced evidence from which the conclusion might be drawn that the land in question is below the line of ordinary high water mark."

Under this ruling land permanently covered by navigable water of the Pacific Ocean one hundred feet deep as a matter of law becomes upland if enclosed within the meander line of a government survey. The Circuit Court was fully advised of, and counsel for petitioners well know, the basis of the findings of the trial court.

The trial court having disregarded the undisputed and uncontradicted evidence which was introduced by respondent proving beyond any question of a doubt that the land involved in this action was and is tideland, and the ruling of the trial court being so clearly erroneous, we submit that the decision of the Circuit Court in granting a new trial was proper.

The Land Involved in This Action Is in Fact Tideland.

The evidence in this action conclusively shows that the land involved in this action was regularly covered and uncovered by the ebb and flow of the tide, and at the *outset we desire to call the court's attention to the fact that the evidence introduced by the respondent is uncontradicted and undisputed.* No evidence was offered by the petitioners concerning the character of the land involved in this action nor as to the location of the boundary line between tideland and upland on Mormon Island. The petitioners were content to, and did, rely entirely upon the patent to Banning and the field notes and the official plat of the Norway survey.

The record in this case is voluminous and we will not attempt to set forth in this brief the evidence in full, but will refer to such portions of the evidence as we believe conclusively support the respondent's contention that the land involved in this action is tideland.

The Diagram, Exhibit 2.

The diagram (Res. Ex. 2; Book of Exhibits 1) shows that portion of the land which is enclosed by the meander line, as described by the courses and distances in the field notes of the Norway survey, and claimed by the petitioners. The straight line extending from east to west represents the southern boundary of the land claimed by the petitioners. The white tongue or projection north of the southern boundary line of the tract claimed by the petitioners is the portion of the island claimed by the petitioners which the respondent concedes is upland. The colored portion represents the area which respondent contends is tideland—the land involved in this action.

The Turner Survey of 1899.

The federal government was proposing or contemplating the construction of certain harbor development work and improvements in the inner bay of San Pedro, and in connection with the proposed improvements Frederick C. Turner, a civil engineer employed by the United States government, made a survey of the inner bay of San Pedro and Mormon Island in the year 1899.

The survey by Turner was made for the purpose of showing the natural conditions which existed within the inner bay of San Pedro [R. 228]. Mormon Island was included in the Turner survey. The purpose of the survey of the island by Turner was to locate on the island the line of ordinary high water mark. The field notes of the Turner survey of Mormon Island were introduced in evidence in this action (Res. Ex. 3; Book of Exhibits 2, 3, 4, 5, 6).

Ordinary high water mark was located on Mormon Island by Turner from his observation of natural conditions, namely, the appearance of drifts and other physical facts which he found on the island [R. 229]. A traverse was then run around the island at that elevation. A map was made of the inner bay of San Pedro from the field notes of the Turner survey, including the survey of Mormon Island.

Map of Turner Survey, Exhibit 4.

This map was introduced in evidence (Res. Ex. 4; Book of Exhibits 7). A large portion of the land involved in this action lies northwesterly of Mormon Island proper and is shown on that map as being enclosed by the light line which encloses the word "island". The Turner high water mark around Mormon Island is shown by the heavy line. The tidal island which lies northwesterly from Mormon Island proper constitutes a large part of the land involved in this action. The colored area on Respondent's Exhibit 1 includes this tidal island.

The figures around the edge of this tidal island—3.5, 3.7, etc.—indicate the elevation of this tidal island above the datum plane of mean lower low water.

This map also shows that Mormon Island was severed into two parts by a slough. The outer line of the tidal island is designated by Turner in the field notes of his survey as "edge of grass". Turner testified that the high water mark would be higher than the line which he designated as "edge of grass" [R. 284].

This map is a public record in the office of the United States District Engineer at Los Angeles, California [R. 231].

The error in the map referred to by petitioners (Brief 150, 151, 152) was an error on the part of the draftsman in that a portion of the line as shown on the map on the easterly side at the southerly end of the island as ordinary high water mark was the line designated by Turner as edge of grass. It is shown on Exhibit 5 between the points designated 1-29 to 1-11. The line which should have been shown on the map as ordinary high water mark is the heavy line on Exhibit 5 between the points marked 6-5 to 6-29. The petitioners, however, are in no position to complain regarding the error, as the land involved in this action is located at the northerly end of the island and there is no showing that the Turner survey at that point is incorrect.

Replat of Turner Field Notes.

A replat was made of the field notes of the Turner survey by Charles A. Hale and David Hughes. A copy of the replat of the field notes was introduced in evidence (Res. Ex. 5; Book of Exhibits 8). The heavy line on this exhibit is the high water mark of the Turner survey. The light line indicates the line designated by Turner as "edge of grass". This exhibit also shows the slough which was at the northerly end of the island and which separated the tidal island from Mormon Island proper. *Turner testified* [R. 302] *that all of the land lying north of the slough as shown on the replat was covered and uncovered by the ebb and flow of the tide.*

Report of Turner Survey, Exhibit 6.

A report of his survey of the inner bay of San Pedro was made to the War Department by Turner [R. 240]. A copy of the finished map of the Turner survey was attached to this report. This map is Respondent's Exhibit 6 (Book of Exhibits 9). Mormon Island is also shown on this map. The hatched area immediately adjacent to Mormon Island at the northerly end thereof is the same land as the colored area shown on the diagram—Exhibit 2.

The Smith Map, Exhibit 7.

Exhibit 7 (Book of Exhibits 10) is a map made of the inner bay of San Pedro in the year 1881. This map was an official record in the office of the United States Engineer at Los Angeles, California [R. 305]. Mormon Island is shown on this map as being a long narrow strip of land and as being "1 foot above high water".

Photographs, Exhibits 10 and 11.

Exhibit 10 (Book of Exhibits 12) is a photograph of the inner bay of San Pedro taken in the month of November, 1908 [R. 327].

Exhibit 11 (Book of Exhibits 13) is an enlargement of a portion of Exhibit 10. Exhibit 11 shows Mormon Island, and shows at a glance the character of the land involved in this action. The letter "A" on Exhibit 11 indicates northerly end of Mormon Island; "B" marks the easterly edge of the southerly end; "C" the most southerly point of the island; "D" the easterly side and "E" the westerly side of the slough which severed the island into two parts [R. 341].

Harbor Line Map, Exhibit 12.

Exhibit 12 (Book of Exhibits 14) is a map showing the location of the harbor lines which had been established in the inner bay of San Pedro by the War Department. This map also shows "the plane of reference is mean of lower low water by Coast and Geodetic Survey", "The average rise of tides above the place on reference is 5-1/10 feet".

The Dessery Survey.

A topographic survey of Mormon Island was made in the year 1909 by F. G. Dessery, who at that time was city engineer of Wilmington. The survey was made under the immediate supervision of one Gerald C. Fitzgerald. That survey was made for the purpose of locating on the surface of Mormon Island the 1 ft., 2 ft., 3 ft., 4.3 ft. 4.8 ft., 5.1 ft., 5.7 ft., and 7.9 ft. contours [R. 375]. Two maps of this survey were introduced in evidence, to-wit, Exhibit 14, Book of Exhibits 15, and Exhibit 15, Book of Exhibits 16. These maps were made by the witness Gerald C. Fitzgerald [R. 376].

Exhibit 16 is the field notes of the Dessery survey.

U. S. Coast and Geodetic Map of 1859.

Exhibit 20 (Book of Exhibits 24) is a map made by the U. S. Coast and Geodetic Survey in the year 1859. Mormon Island is shown on this map as being immediately above Rattlesnake Island. The southerly end of Mormon

Island as shown on this map is near the letter "R" in the word "Pedro" and the northerly end is near the letter "C" in the word "Creek". This map shows all of Mormon Island as being marsh land.

Bache Map of 1859.

Exhibit 21 (Book of Exhibits 25) is a map of a hydrographic survey of the inner bay of San Pedro made in the year 1859. Mormon Island is shown on this map as being a long narrow tract of land, its boundaries being the same as those shown on Exhibit 20.

The Coast Survey Map of 1852.

Exhibit 23 (Book of Exhibits 26) is a map of the inner bay of San Pedro made in the year 1852. No upland is shown on that map as being in the inner bay of San Pedro. The land within the inner bay of San Pedro is shown on that map as marsh land or mud flats.

Report of Chief of Engineers to the Secretary of War.

Exhibit 24 [R. 410] consists of extracts from the annual reports of the chief of engineers to the Secretary of War for the years 1902, 1903, 1904, 1905, 1906, and 1907. The engineer states that the average rise of the tide in the inner bay of San Pedro above the plane of reference is 5.1 feet. [R. 418, 440, 476, 533, 577, 608.]

The Composite Map.

A composite map of the Norway survey, the Turner survey, U. S. Pierhead Line, and Dessery survey, was made by Charles A. Hale, an engineer employed by the Harbor Department of the City of Los Angeles, which map was introduced in evidence in this case, being Exhibit 25 (Book of Exhibits 29).

The purple line as shown on this exhibit is the meander line as described by the courses and distance in the field notes of the Norway survey. The heavy green line is the high water mark of the Turner survey in 1899. The light green line is the line designated by Turner "edge of grass". The red lines are the contours of the Dessery survey made in 1909.

It will be noticed that the 5.1-ft. contour line of the Dessery survey is almost coincident with the high water mark of the Turner survey. The high water mark of the Turner survey was not located at any known elevation [R. 299]. The meander line of the Norway survey corresponds generally to the Turner line designated "edge of grass" which the record shows was approximately 3.5 feet above mean lower low water. The tongue or projection shown on the diagram (Respondent's Ex. 2; Book of Exhibits 1) in white represents the same land as that shown on the composite map inclosed by the 5.1-foot contour line of the Dessery survey and being north of the most northerly line designated "property line", which line represents the southern boundary of the land claimed by petitioners.

This map also shows the location of the pits which were excavated in the years 1931 and 1933 on property

adjacent to the property claimed by petitioners for the purpose of determining the elevation of the original surface of the island at the places where the pits were excavated.

Testimony of David Hughes.

David Hughes was an engineer employed by the War Department. Hughes carefully examined Mormon Island on several occasions between the years 1900 and 1908 when the island was in a state of nature [R. 314-315]. His examination of the island was made in connection with the matter of the survey of the inner bay of San Pedro for the purpose of determining where the harbor lines should be located [R. 315-318]. Mr. Hughes testified [R. 318] that the slough which existed at the northerly end of the island was correctly located on Respondent's Exhibit 5; that he had observed that portion of the island lying north of the island on numerous occasions and that that portion of the island was covered by water when the tide was at an elevation of 5 feet [R. 319]. The meander lines of the Norway survey as described by the courses and distances in the field notes were retraced on the ground by Hughes [R. 328] and he testified "all the corners as restored by me were below ordinary high water mark. Those on the east and south and north being at about half tide level. That would be an elevation of about three feet above the plane of mean lower low water" [R. 329]. Hughes also testified that the line of ordinary high water mark as established by the surveyor Turner, and shown by the heavy line on Respondent's Exhibit 5 (Book of Exhibits 8) was covered with water when the tide was at an elevation of.

5.1 feet above datum [R. 331-332]. The witness Hughes also testified that he had navigated the slough which severed the island into two parts, and shown on Respondent's Exhibit 5, between the points marked 4-10 on the west and 4-50 on the north when the tide was above half tide [R. 319].

Testimony of Gerald C. Fitzgerald.

Gerald C. Fitzgerald was the engineer who had immediate supervision of the Dessery survey hereinabove referred to. He testified that he had observed the island on numerous occasions and that "that portion of the Island lying north of the slough was prior to the reclamation of 1909 lower than that portion of the land shown on Plaintiff's Exhibit No. 5 between the heavy blue lines; that when the tide reached an elevation of five feet that portion of the Island lying immediately north of the slough would be entirely covered with water" [R. 378]. Fitzgerald also testified "that there was a slough at the northerly end of the Island which extended in a northeasterly direction through the Island and that he had rowed or assisted in rowing a boat through the slough in the year 1908," [R. 376].

Testimony of Harrison R. McLaurin.

Harrison R. McLaurin, a civil engineer employed by Dessery in connection with the survey of Mormon Island in 1909, testified that prior to the reclamation in 1909 and 1910 "a slough existed in the northerly portion of the Island which extended from the westerly to the easterly side; that he had rowed and pushed a boat through the slough; that the portion of the Island lying imme-

diately north of the slough was lower than that portion immediately south of the slough; that he had seen the Island on numerous occasions when it was in a state of nature and that he had seen that portion of the Island which lies immediately north of the slough entirely covered with water on many occasions; that when it was covered with water the tide would be at approximately five feet elevation;" [R. 385-386].

TESTIMONY OF EUGENE W. MERWIN.

In the years 1931 and 1933 Eugene W. Merwin, a civil engineer, excavated a number of pits on the tract of land lying immediately south of the land claimed by the petitioners. He located the original surface of the island and determined the elevation thereof by transferring levels from a bench mark situated near the Southern Pacific Depot in Wilmington. He testified that the elevation of the original surface of the island at the points where each of the test pits were excavated was as follows [R. 388]:

"* * * Test Hole No. 1, no original surface was found; Test Hole No. 10, elevation 4; No. 11, no original surface; No. 12, elevation 3.8; No. 13, elevation 4.6 but identification was questionable; No. 14, there was no indication of old surface; No. 15, there was no indication of old surface; No. 16, elevation 5.2; No. 17, elevation 5.5; No. 18, elevation 5.2; No. 19, was not conclusive; No. 20, elevation 5.0; elevation of No. 21 not well defined; No. 22, elevation 4.7; No. 102, elevation 4.1; No. 103, elevation 4.1; No. 104, elevation 3.7; No. 105, elevation 4.7; No. 105A, 4.6; No. 106, elevation 4.1; No. 107, elevation 4.8;

No. 108, elevation 4.0; No. 108A, elevation 2.7; No. 108B, elevation 3.6; No. 109, elevation 4.6; No. 110, elevation 4.7; No. 111, elevation 4.8; Nos. 112, 113 and 114 were uncertain. * * *"

The location of the various pits as excavated by Merwin are shown on the composite map (Res. Ex. 25; Book of Exhibits 29). The difference in the elevation of the original surface of the island as determined by Merwin and that as shown by the contours of the Dessery survey is so slight that it may be said that the two agree.

The evidence hereinabove referred to, in fact all of the evidence as shown in the record from pages 187 to 633 inclusive, together with the exhibits hereinabove referred to, is absolutely uncontradicted. As hereinbefore stated, the petitioners offered no evidence whatsoever, save and except the patent to Banning and the field notes and plat of the Norway survey. We therefore submit that the evidence conclusively shows that the land involved in this action is in fact tideland and that the finding of the trial court that the land is not tideland was and is clearly erroneous.

A large portion of petitioners' brief is devoted to criticism of the proof offered by respondent. Notwithstanding the criticism of the proof offered by respondent by petitioners, it is interesting to note that petitioners do not refer to any evidence in conflict with that hereinabove referred to or, in fact, in conflict with any of the proof offered by respondent.

It is also interesting to note that petitioners point to no evidence which is in conflict with the proof which conclusively shows that the land was regularly covered and

uncovered by the ebb and flow of the tide, which is the test for determining whether land is or is not in fact tideland.

THE CASE OF DEGUYER V. BANNING.

The title to Mormon Island has heretofore been the subject of litigation in an action entitled *DeGuyer v. Banning,* 167 U. S. 723. Plaintiffs in that action were the heirs of the patentee named in the patent to the Rancho San Pedro. The defendant William Banning is the patentee named in the patent involved in the case at bar. The plaintiffs were claiming under the San Pedro grant and Banning was claiming under the patent issued directly to him by the United States in December, 1881. That action involved the question of whether or not the island was covered and uncovered by the navigable waters of the inner bay of San Pedro and therefore within the inner bay exception which excluded from the San Pedro grant the navigable waters of the inner bay of San Pedro. William Banning testified in that action in his own behalf, and this Honorable Court had occasion to quote a part of his testimony, which is found in 167 U. S. at page 734, and which is as follows:

> "Banning testified in his own behalf that he entered into possession of Mormon Island in 1880, his possession beginning by his buying out the person then on the island. But he does not state who that person was or by what right he was in possession. He also testified that when he took possession he claimed that the title was in the United States, and he continued to so claim until he obtained a patent from the United States, when he claimed the property for himself; and that he has been in possession since

1890, no one else claiming the right of possession until the present plaintiffs set up their claim by this suit. He said: 'This tract of land known as Mormon Island is an island; at about half tide it is an island, and is now an island, at low water; at low water it is only partly surrounded by water; at low water it would be about two feet of water around it; *at high tide it is almost all covered with water.* . . . A very small portion of the island is above ordinary high water. At mean tide, I don't think there is an acre above water. *The descriptive clause in the patent to me extends to mean low water.* I think to include eighteen acres would carry it to mean low water. We occupied a portion of it that was covered with water. I have shipways there and houses on piles. About an acre is covered in that way. Another portion of the island we run lighters on and pile lumber on when the high tide falls. We use in that way sometimes a couple of acres on the west side, the channel side of the island, and that kind of occupation would cover about three acres.'"

The court referred to the fact that Mormon Island was practically covered with water at high tide, and in this connection the court, at page 735, said:

> "It is not disputed that Mormon Island is within the exterior lines of this inner bay, and is almost covered with water at high tide. That the part excluded or excepted from the survey embraced the navigable waters of the inner bay cannot be doubted."

The court did not decide the question as to whether or not William Banning was the owner of said land by virtue of said patent issued to him in December, 1881. It decided that Mormon Island was not conveyed to the pat-

entees named in the patent to the Rancho San Pedro. Neither did it decide whether or not Mormon Island passed to the state of California upon its admission into the Union in 1850, and in disposing of that question the court said:

> "It is proper to say that the court decides nothing more in this case than that the plaintiffs are not entitled to recover possession of the specific lands here in controversy. In this view it is unnecessary to decide whether the defendant Banning was entitled to a judgment on his cross-complaint, nor whether the lands under the navigable waters of the inner bay of San Pedro, and those here in controversy or any part thereof, passed to the State of California upon its admission into the Union, or after the issuing of the patent of 1858."

A certified copy of the record in the *DeGuyer* case, which contained the testimony of William Banning hereinabove referred to, was offered in evidence [R. 371]. Objection was made to its introduction, which objection was sustained by the trial court, which ruling was clearly erroneous.

Statements and admissions made by a grantor, which statements or admissions are made before he executed the deed, and made at a time when he claimed to be the owner of the land, are admissible against one who claims under him.

Section 1849, Code of Civil Procedure of the state of California, is as follows:

> "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

For further authorities in support of our contention, we submit the following:

Northrop v. Columbian Lumber Co., 186 Fed. 770;

Donahue v. Sweeney, 171 Cal. 388;

Barlow v. Frink, 171 Cal. 165;

Morgan v. Myers, 159 Cal. 187;

Grieseza v. Terwilliger, 144 Cal. 456;

McFadden v. Ellmaker, 52 Cal. 348;

Phelps v. McGloan, 42 Cal. 298.

Reclamation of the Island Did Not Change the Character of the Island.

The act of the legislature of the state of California (Calif. Stats. 1911, p. 1256) granted to the City of Los Angeles all of the tidelands, whether "filled or unfilled", situated and located within the corporate limits of the City of Los Angeles.

In the years 1909-1910 the channels on both sides of Mormon Island were dredged to a considerable depth and the dredging or debris deposited on the island, which resulted in raising the surface of the island some six or eight feet.

The petitioners argue that at the date of the grant to the city the land involved in this action was not below the line of mean high tide and therefore the city acquired no title to the land.

The title to land acquired by accretion is a title acquired under the operation of the law of the state, which each state determines for itself.

City of St. Louis v. Rutz, 138 U. S. 226, 34 L. Ed. 941.

The filling in of tideland by artificial means or by the industry of man does not change the character of the land.

City of Los Angeles v. Anderson, 206 Cal. 662;
Patton v. City of Los Angeles, 169 Cal. 521.

The deposit of alluvion upon tideland by artificial means does not inure to the benefit of the upland owner, but the right to recover possession thereof is in the state or its successor in interest.

Dana v. Jackson St. Wharf Co., 31 Cal. 121;
Forgeus v. County of Santa Cruz, 24 Cal. App. 192.

The upland owner is entitled only to the accretion when such accretion has resulted from natural sources and been of imperceptible formation.

Curtis v. Upton, 175 Cal. 322;
Strand Improvement Co. v. Long Beach, 173 Cal. 765.

Special Defenses to the Action Were Abandoned by Petitioners.

All of the allegations contained in the various separate defenses of petitioners are denied by the respondent, both generally and specifically [R. 109-160]. No evidence was offered by petitioners in support of the allegations contained in any of their various separate defenses, save and

except in support of the allegations contained in their first separate defense. Therefore all the separate defenses, save and except the first separate defense, were abandoned by petitioners by reason of their failure to offer proof in support thereof.

None of the questions, either of law or fact, raised by the separate defenses and the respondent's reply thereto were presented to or passed upon by the courts below and therefore are not now properly before this court for its consideration and decision.

It is only in exceptional cases in which this Honorable Court will consider questions not pressed or passed upon in the courts below.

Duignan v. United States, 274 U. S. 195, 71 L. Ed. 996.

The Claim of Petitioners That "the Circuit Court of Appeals Erred in Failing to Hold That the Admissions of the Pleadings Established Facts Which Estop Respondent From Asserting the Locus in Quo to Be Tideland."

The points urged by petitioners under this heading were not presented to or passed upon by the trial court. All the allegations in petitioners' answer upon which petitioners' plea of estoppel is based are denied by respondent. Even had the trial court passed upon the points urged by petitioners under this heading, any ruling which the trial court might have made that the City of Los Angeles was estopped from asserting title to the land involved in this action would have been clearly erroneous.

The City of Los Angeles has no power to dispose of tidelands and therefore no rights adverse to the city could

be acquired in and to said lands under the doctrine of equitable estoppel. The Board of Harbor Commissioners of said city has no power to divest the city of its title to said lands.

RESPONDENT HAS NO POWER TO DISPOSE OF TIDELAND.

Petitioners refer to the license agreement entered into between the Board of Harbor Commissioners and the petitioner Pacific Coast Borax Co. and argue that by that agreement the respondent admitted that the petitioners were the owners of the property involved in this action.

The grant of the tidelands was to the City of Los Angeles (Calif. Stats. 1911, p. 1256), and not to the Harbor Department or the Board of Harbor Commissioners of said city.

Title to all property acquired by any department of the city government of the City of Los Angeles is vested in the City of Los Angeles and not in the department acquiring the same.

> "Sec. 423. The title to all property of the City of Los Angeles, now owned or hereafter acquired, including all such property in the name of any officer, board, commission, or department of the city, other than the Board of Education, shall be vested and held in the name of The City of Los Angeles; and it shall be the duty of every such officer, board, commission, or department, or the successor thereof in office, immediately upon the taking effect of this charter, to execute to The City of Los Angeles such conveyances as may be necessary to put the provisions of this section into effect."
>
> Sec. 423, Los Angeles City Charter, Calif. Stats. 1925, p. 1150.

The City of Los Angeles has no power to dispose of any tidelands. The grant from the state expressly prohibits the city from selling or in any manner disposing of any of its tidelands.

Stone v. City of Los Angeles, 114 Cal. App. 192.

The charter of the City of Los Angeles (Sec. 140, Sub. (a)), (Calif. Stats. 1925, p. 1073) prohibits the City of Los Angeles from disposing of any of its tidelands. Any act on the part of the City of Los Angeles or any of its officials attempting or purporting to sell or otherwise dispose of any of its tidelands, or any act wherein any board or officer attempts to in any manner divest the city of its title to such lands, would be *ultra vires* and absolutely void.

THE PLEA OF ESTOPPEL IS NOT AVAILABLE AS AGAINST THE RESPONDENT.

Title to the property involved in this action being vested in the City of Los Angeles and not in the Board of Harbor Commissioners or the Harbor Department of said city, the same being held by the city in trust for the public, and the city having absolutely no power to sell or otherwise dispose of the same, the recital in the license agreement entered into between the Board of Harbor Commissioners and the Pacific Coast Borax Co. that the Pacific Coast Borax Co. was the owner of the property involved in this action would not and could not divest the city of its title to said land nor preclude the city from asserting its title thereto at any time.

People v. Kelber, 152 Cal. 731;

City of San Diego v. Cuyamaca Water Co., 209 Cal. 105.

Where land is held in trust by a municipal corporation and such municipal corporation is prohibited by law from selling or disposing of such land, no rights in and to such land can be acquired adverse to the public under the doctrine of equitable estoppel. A municipality cannot do indirectly what it cannot do directly.

Detroit United Railways v. Detroit, 255 U. S. 171;

Lantz v. City of Los Angeles, 185 Cal. 262;

Simons Brick Co. v. City of Los Angeles, 182 Cal. 230;

San Pedro etc. R. R. Co. v. Long Beach, 172 Cal. 631.

One of the questions involved in the *Detroit United Railways* case, *supra,* was whether or not the city of Detroit was estopped from denying the franchise rights of the street railway company by reason of the acquiescence of the city officials in the expenditure of large sums of money by the company after the expiration of the franchise. In that case the court said (65 L. Ed. 575):

> "Allegations are made which are supposed to have the effect of estopping the city of Detroit from denying the franchise rights of the plaintiff in the streets of the city because of expenditures of large sums of money with the knowledge and acquiescence of the city authorities and the people of the city since the franchises have expired.
>
> "Under the Constitution of Michigan, sec. 25 (as revised 1908), it is provided that no city or village shall grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall first have the affirmative vote of three-fifths of the electors. This phase

of the case is covered in principle by our decision in Denver v. New York Trust Co., 229 U. S. 139, 57 L. Ed. 1123, 33 Sup. Ct. Rep. 657, in which a similar provision of the Colorado Constitution was under consideration, and wherein this court, in speaking of the provision of the Constitution of the state of Colorado, said:

" 'Besides, article 20, sec. 4, of the state Constitution then in force, provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to make an election to purchase or to renew, the attempt would have gone for nothing.'

"The provision of the Constitution of Michigan, in force when the ordinance here in controversy was passed, necessarily preevnts acquiring rights by estoppel which might arise were the franchise *within the power of the city to grant.* In Denver Union Water Co. v. Denver, 246 U. S. 178, 62 L. Ed. 649, P. U. R. 1918C, 640, 38 Sup. Ct. Rep. 278, the provision of the Colorado Constitution was not considered. Nor in Detroit United R. Co. v. Detroit, 248 U. S. 429, 63 L. Ed. 341, P. U. R. 1919A, 929, 39 Sup. Ct. Rep. 151, was reference made to the like provision of the Michigan Constitution now relied upon."

The City of Los Angeles being absolutely without power to sell or to otherwise dispose of the land involved in this action, no act of any of its boards or officers could estop the city from asserting title to the same.

The *Cuyamaca Water Co.* case, *supra,* involved the question as to whether or not the city of San Diego was

estopped from asserting title to certain water which it held in trust for the use and benefit of the people of that city. In that case the city council, the legislative body of the city, had adopted a resolution disclaiming any intent on the part of the city of San Diego to interfere with the uses then being made of the water by the defendant Cuyamaca Water Co. The city council of the city of San Diego not only adopted the resolution disclaiming any intent to interfere with the use of the water by the defendant Cuyamaca Water Co., but it acquiesced in and approved of the appropriation, developments and use of the water of the San Diego River by the defendant. The court in that case held that the acts of the city council did not estop the city of San Diego from asserting its rights to the water, and in that case the court said (p. 143):

> "Even, however, if it were to be conceded that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, we are satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upper appropriators, or even of upper riparian owners of the waters of a stream, to the use of the waters of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for public use. The general rule upon this subject is stated in Volume 10, California Jurisprudence, page 650, and cases cited, as well as certain limited exceptions to the rule. The defendants and interveners, appellants herein, have referred us to no case wherein the mere passive acquiescence of a public corporation or its officials in the invasion

> of its right of property, *however long continued,* has been held to operate as an estoppel against its *assertion of those rights.* * * *"

Petitioners cite the case of *Times-Mirror Co. v. Superior Court,* 89 C. D. 635, in support of their contention that the plea of estoppel is available as against a municipal corporation. That case is not in point. The facts of that case are briefly as follows: The City of Los Angeles was seeking to acquire for public purposes the property owned by the Times-Mirror Co. and notified the Times-Mirror Co. of its intention to acquire such property. The Times-Mirror Co. acquired other property and erected a costly building thereon. The City of Los Angeles commenced an action for the purpose of acquiring the property under the right of eminent domain. The case was appealed to the Supreme Court of the state of California, and after the decision of the Supreme Court had become final the city attempted to abandon the condemnation proceedings. The court held that the city was estopped from abandoning the action.

The City of Los Angeles *is expressly authorized* to acquire property for public purposes. Assuming that the City of Los Angeles had absolutely no power to acquire property under the right of eminent domain, could it be successfully argued that the city would have been compelled, under the doctrine of equitable estoppel, to proceed with the condemnation action for the purpose of acquiring the property of the Times-Mirror Co.?

The case of *City of Los Angeles v. Cohn,* 101 Cal. 373, cited by petitioners, is likewise not in point for the reasons pointed out by the Supreme Court of the state of California in the *Cuyamaca Water Co.* case, *supra.*

Had the issues raised by the petitioners' second affirmative defense and the respondent's reply thereto been tried, the respondent no doubt could have established that the petitioners, at the time they claim to have acquired title to the tideland, knew, or should have known, that the land was tideland and owned by the respondent.

The Claim of Petitioners That "the Circuit Court Erred in Failing to Hold That the Dismissal of a Former Tideland Action Involving the Locus in Quo, Made Pursuant to a Compromise, Operated as a Retraxit".

The points urged by the court under this heading were not presented to nor passed upon by either of the courts below. All of the allegations of petitioners' answer upon which petitioners rely in support of their contention that the dismissal of the case of *People v. Banning* constitutes a retraxit, are denied [R. 122-130].

Prior to the granting of the tidelands to the city the Attorney General of the state of California commenced an action, to-wit, *People v. Banning,* to quiet title to certain tidelands abutting upon the inner bay of San Pedro. After the granting of the tidelands to the city that action was dismissed *without prejudice* [R. 124, 125].

A dismissal without prejudice is not a bar to a subsequent action in any court upon the same cause of action.

Hibernia Sav. etc. Soc. v. Portener, 139 Cal. 90;

Moore v. Russell, 133 Cal. 297;

Westbay v. Gray, 116 Cal. 660;

Wolff & Co. v. Canadian Pacific Ry. Co., 89 Cal. 332.

A dismissal made by one party upon the written consent of the other is not a bar.

McCord v. Martin, 47 Cal. App. 717;

Rincon etc. Power Co. v. Anaheim Union Water Co., 115 Fed. 543.

A judgment of dismissal upon the motion of a plaintiff before a determination of the merits, is not a bar to a subsequent action in any court upon the same cause of action.

Carr v. Howell, 154 Cal. 372;

Estate of Bump, 152 Cal. 274;

Pierce v. Hilton, 102 Cal. 276;

Parks v. Dunlap, 86 Cal. 189.

The compromise agreement referred to by petitioners was entered into between the City of Los Angeles and the Bannings concerning the respective rights of the City of Los Angeles and the Bannings in and to Tideland Location No. 152, which is a separate, distinct and different parcel of land from that involved in this action and had no connection whatsoever with the land involved in this action.

Wherefore, respondent respectfully submits that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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City Attorney,

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Special Counsel,

Solicitors for the Respondent.